United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7161

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7161

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

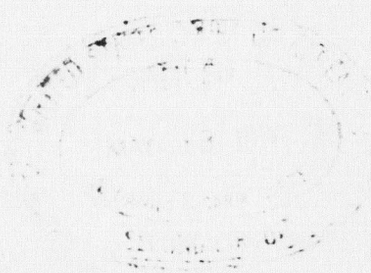
Defendants-Appellants-Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

JOINT APPENDIX

VOLUME II

§ 4 Trial Transcript



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§4 TRIAL TRANSCRIPT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against- 73 Civ. 713

FORD MOTOR CO. and FORD MARKETING CORPORATION,

Defendants.

----------x

B e f o r e :

HONORABLE THOMAS P. GRIESA,

District Judge.

New York, N.Y.
September 23, 1974
10:00 a. m.

A p p e a r a n c e s :

JULIEN & SCHLESINGER, P.C.,
Attorneys for Plaintiff,
By: ALFRED S. JULIEN, ESQ.,
STEWARD S. SCHLESINGER, ESQ.,
DAVID WASSER, ESQ., and
DAVID JAROSLAWICZ, ESQ.,
of Counsel.

SULLIVAN & CROMWELL,
Attorneys for Defendants,
By: ROBERT MAC CRATE, ESQ., and
DAVID CLAYTON CARRAD, ESQ.,
Of Counsel.

Present: William A. Zolbert, Esq.

(Case called.)

MR. JULIEN: Before proceeding, I have a small housekeeping matter.

On Friday last a stipulation was entered into between counsel referrable to some of the stipulated facts in this case and the contentions. Does your Honor have that before you?

THE COURT: Yes, I do.

MR. JULIEN: With respect to all of it, I guess we can get along with the exception of the fact there is one paragraph which I consider major and which I can't agree to the stipulation because I do not think that it properly conveys the facts.

THE COURT: Whatis that?

MR. JULIEN: That is Paragraph 18. Then I have 13 and 14 which need some minor alteration for explanation, and it will be perfectly all right.

In 18 it is stated the wholsale incentive allowance was initially established for crash parts effective November 1, 1968 at the behest of the Federal Trade Commission.

It is quite true in some previous documentation submitted to the court such a suggestion is made. Well, it is made by the defendants throughout, and I think it was picked up by the plaintiffs, and a suggestion was made to that effect.

I find, however, and I have come into this case, as your Honor, knows, very late, and my real review has been during my last few days, I find that first this allegation, this statement, does not jibe with the fact.

THE COURT: In what way? Let's try to cut it short.

MR. JULIEN: The Federal Trade Commission in 1968 was after the Ford people because of their failure to provide crash parts for repair shops.

THE COURT: Could I just interrupt you? I assume from your contentions of fact that are not stipulated, Mr. MacCrate, youare going to go into this stipulation about the Federal Trade Commission in a little depth, right? You are going to put on evidence?

MR. MAC CRATE: The only addition, your Honor, was to provide the explanation, that is, the difference between the stipulated fact and the contention.

THE COURT: If you are going to go into it --

MR. MAC CRATE: AS far as going into all of the discussions that took place between the Federal Trade Commission and Ford, I believe that would be an imposition upon the Court.

THE COURT: I am just wondering, do we need to spend time wondering about whether they stipulate 18? If you are going to put on any evidence at all about the purpose

of the FTC making this request or recommendation, I assume that the fact of the recommendation or request will be something you will prove anyway. If they don't want to stipulate to 18, what difference does it make right now?

MR. MAC CRATE: Mr. Julien said to me I couldn't prove it, I couldn't get the Federal Trade Commission people here to prove it, and this may very well be a problem in bringing Federal Trade Commission staff to the witness stand before you.

The basic fact is really beyond dispute. In the proposed findings of fact that were submitted by the plaintiff in July to your Honor, this statement appears:

"This wholesale pricing plan was instituted by defendants at the behest of the Federal Trade Commission."

That is a statement by plaintiff's counsel. Then, after Mr. Julien entered this case --

THE COURT: I have their trial brief, in response to the urging of the Commission.

MR. JULIEN: If those statements are made, they are made by Mr. WAsser in error, and they are carried on by the gentlemen that assisted me with respect to this brief, but I have correspondence here which is new which indicates that it was not at the behest of the Federal Trade Commission at all, but that the Federal Trade Commission was after Ford with

respect to their pricing policies so far as it deleteriously affected the independent repair shops, and that this plan filed by them was not at the behest of the Federal Trade Commission, never received the imprimatur of acceptance by Federal Trade. On the contrary, as recently as 1969 they said the plan which you promised us will take care of this problem does not take care of the problem.

THE COURT: You are now going into evidence. Your representative signed this stipulation on Friday, and on this one point, if you present evidence to indicate that it is inaccurate, I will consider allowing you to withdraw from the stipulation; but I don't want to hear evidence now in this kind of informal manner. YOu have referred to documents and so forth. On this one point I will allow you to produce evidence, and to apply later to withdraw from this paragraph of the stipulation; but I will not permit you to withdraw from it at the present moment.

MR. JULIEN: I haveone further statement to make.

THE COURT: Well, leave paragraph 18, please, and I want to go to Paragraph 13.

It seems to me there is a little ambiguity in Paragraph 13, Mr. MacCRate and Mr. Julien -- I guess Paragraph 11. Paragraph 11 says FMC stocks Ford, Lincoln, and Mercury crash parts for all models for at least the five

most rec ent model years, and its maintained stock of automotive parts at any time exceeds 240,000 different parts.

The 240,000 is not crash parts, is it?

MR. MAC CRATE: No, the first paragraph of the sentence refers to crash parts.

THE COURT: Why don't we just then clarify it and say its maintained stock of automotive parts, crash parts and other types of parts.

MR. MAC CRATE: Might we say including crash parts?

THE COURT: All right.

MR. JULIEN: That will be satisfactory.

THE COURT: This becomes a little more important down below.

13 says FMC distributes automotive parts through three channels of distribution, selling all parts to franchise dealers and selling a limited number of large volume parts, such as batteries, spark plugs, and filters to independent distributors known as direct account warehouse distributors, and national accounts, primarily oil and tire companies as well as to franchise dealers.

The large volume parts sold to direct contact warehouse distributors and national accountsare not crash parts.

MR. JULIEN: Thatis right, they do not include crash parts.

MR. MAC CRATE: They do not.

THE COURT: I think it might help to make that clear.

MR. JULIEN: Your HOnor has anticipated the very thing I was going to say with respect to that.

THE COURT: I figured that is what you had in mind because I think that should be cleared up.

Why don't we just add a sentence, the parts sold to the direct account warehouse distributors and national accounts are not crash parts.

Is that agreeable, Mr. MacCrate?

MR. MAC CRATE: Yes, your Honor.

MR. JULIEN: That would apply to 14 as well, I take it?

THE COURT: Let's look at 14.

FMC sells automotive parts to approximately 6800 franchise dealers, to approximately 1,000 direct account warehouse distributors and to approxiamtely 40 national accounts throughout the United States, and so forth.

I think that is clear in view of the change we made to 13.

I didn't mean to cut you off, Mr. Julien, but I

would like to come back to 18 later.

MR. JULIEN: There is one reason why it would be propitious to take it up now, because what your Honor has suggested runs counter to the position that we have to take in this trial.

YOu will find that in our latest brief it is said that whatever Federal Trade Commission or indeed any other governmental regulating agency may say with respect to a plan or a system, if it violates the law, that acquiescence would mean nothing. So I am taking the position --

THE COURT: What do you mean your latest brief?

MR. JULIEN: The one submitted this morning.

United States vs. Socony Oil Vacuum says it does not matter if any regulatory agency has given its implied or active acquiescence. Should the plan violate the anti-grust laws, that acquiescence is meaningless.

I am going to take the position here that no matter what the Federal Trade Commission did ir did not do with respect to this plan would make no difference inyour HOnor's determination. Consequently, I do not wish to be in the position of introducing any information or evidence relative to the Federal Trade Commission's position vis-a-vis this plan.

THE COURT: You have stipulated and you want to be

relieved from your stipulation and you started to show me documents. It doesn't seem to me very orderly to just have an informal showing of documents on a point that may be relevant on at least as far as background is concerned at this stage in the trial. YOu have to put your case on first and if you want to make an issue about the Federal Trade Commission matter as part of your direct case, you can. If you want to wait and make it an issue in a rebuttal case, you can; but to get out of that stipulation, I am going to require some admissible evidence from you and not just the kind of informal reference to some documents and you can handle it at any point you want; but it seems to me not right now in an informal manner. Thatis all I am saying.

MR. JULIEN: As long as it is understood, I take the position first that the Federal Trade Commission rulings have no effect upon this case, and secondarily, they have indeed made no ruling, then I am perfectly willing to proceed that way.

THE COURT: Fine, I understand your position.

You used the word "ruling." I don't think that Mr. MacCrate ever contended that there was an FTC order or rule or anything that formal. His contention has been that there was a request, and you have stipulated as of now that there was a request.

That, of course, raises the issue of law what effect legally such a request would have. Ifyou want to challenge the idea there was even a request, and you want to be relieved of your stipulation on that, that is the narrow thing I was talking about. YOu ought to present some evidence. I think we understand each other. Why don't you go ahead with your case?

MR. JULIEN: Very well.

Mr. Rowland, please.

M O R R I S J . R O W L A N D , called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

MR. JULIEN: I had meant to ask your Honor before questioning this witness whether it was your desire to have any opering statements by counsel.

THE COURT: I don't think we need it in view of the briefs.

MR. JULIEN: Very well.

DIRECT EXAMINATION

BY MR. JULIEN:

Q Mr. Rowland, are you connected with either Ford Motor Company or the Ford Marketing Corporation?

A Yes.

Q Which of the two?

A. Foid Marketing Corporation.

Q. In what capacity are you connected with them?

A. I am the general sales manager of the Ford Parts Division.

MR. JULIEN: Your Honor, how do you wish to handle this? There will be times where I assume both sides may be reading from depositions which have been taken in this case. Do you prefer that we read verbatim or just make reference by page and line?

THE COURT: It depends on the purpose.

MR. JULIEN: I am not talking about when we confront a witness.

THE COURT: You mean when you want to introduce a deposition into evidence?

MR. JULIEN: Right.

THE COURT: Unless it is very brief, I see no point in reading it, but I take it your depositions haven't been excensive. Why don't we cross that bridge when we come to it, and if it is just a little excerpt, you can read it.

MR. JULIEN: It is more than that.

THE COURT: You are now going to introduce a lot of depositions?

MR. JULIEN: After or during my examination of this witness. It really doesn't matter excepting I just want

to know how you prefer having it done.

THE COURT: I think it is a lot better to introduce it and just let me read it.

Why don't you go ahead with this witness. He is here.

Q Are you familiar, Mr. Rowland, with the Central Agency in Yonkers and their experience with Ford Motor Company?

A I am familiar with the file on it.

Q Are you also familiar with the file on the FLM Collision Parts?

A Yes.

Q Was Central--for the sake of cutting it short we will call it Central -- was Central one of your franchise agencies back in 1968?

MR. MAC CRATE: Objection, your HOnor. The examiner is now changing from Central Agency in Yonkers, which is the initial expression used, to Central, which is Central Lincoln-Mercury, a franchise dealer in Brooklyn.

MR. JULIEN: I will revise it.

THE COURT: The identity is in Paragraph 22 of the stipulation. It is Central Lincoln-Mercury of Brooklyn, New York,and it is stipulated that in July 1972 the name was changed to Atlas Lincoln-Mercury.

Did Atlas Lincoln-Mercury remain in Brooklyn?

THE WITNESS: My understanding is they took over the same address as Central Lincoln-Mercury.

Q. Can you tell us approximately how long Central Mercury had been one of the Ford Dealers?

A. No, I can't.

Q. How long have you been with the company?

A. 29 years.

Q. Was it some time prior to 1965 that Central was one of the dealers?

A. I don't know.

Q. One of the dealers for Ford?

A. I don't know.

Q. Ford dealers are franchise dealers, are they not?

A. Yes, we have a franchise with Ford dealers.

Q. And these franchises are underwritten agreements; is that so?

A. Yes.

Q. Do you have and have you seen or have you seen the franchise agreement with respect to Central and the Ford company?

A. The specific agreement?

Q. Yes.

A. No.

Q. Do you have a sample agreement which was the kind used during the period that Central was one of your franchise dealers?

A. There are standard provisions in our agreement with Ford dealers which are the same between our company and all Ford dealers. Those standard provisions, I have copies of those, yes.

Q. May we have one of those copies, please?

A. When I say I have them, in my office.

MR. JULIEN: Perhaps counsel has a copy.

MR. MAC CRATE: Defendants' Exhibit A for identification is a form of Ford sales and service agreement.

MR. JULIEN: Which was the kind used during Central's period of agency?

MR. MAC CRATE: That particular agreement, I believe Mr. Rowland can probably establish as to the date of it.

THE COURT: You are saying that is a form of a franchise agreement, right?

MR. MAC CRATE: Yes. It bears a notation on the first page of 4/27 which would suggest April of 1972.

MR. JULIEN: Do you happen to have the Central agreement?

MR. MAC CRATE: We do not have it here in court, so far as I know.

THE COURT: Let's go ahead with what we have.

MR. MAC CRATE: We had no advance request for it.

MR. JULIEN: I can't use this, if your Honor please. This is prior to the time I was interested in.

Q Mr. Rowland, can you tell us from Defendants' Exhibit A for identification whether this is the same kind of franchise agreement used during the period of Central's franchise in the years 1965 to 1972?

A When you say same kind, I don't really know how to respond to that. I am sure there are probably word changes, but when you say the same kind --

Q In substance, is it the same?

A I would have to look at them side by side.

THE COURT: There must be a part you are interested in. How many pages to this document? You are not interested in the whole document. You must be interested in some particular provision. I certainly have to know the provision you are interested in, and I have to know the position if any Mr. MacCrate is interested in. We don't have to worry about the whole document.

MR. JULIEN: Let's defer that for a moment until we get Central's, which we do have under subpoena, I believe.

THE COURT: All right.

Q Now, sir, each of your dealer agencies back in

'65 down to and including 1973 operated under a code number, did it not?

A. They have a code. Incidentally, the are not agencies of Ford. They are dealerships.

Q. Very well. These code numbers are assigned to dealers by the Ford Company?

A. That is right.

Q. And the purpose of the code is so that on pick-ups of crash parts, this code number is presented at the place of pickup, is it not?

A. That is the purpose of the code, but to identify the customer we are doing business with for our billing purposes.

Q. In the case of crash parts, those customers are only Ford dealers; isn't that so?

A. That is correct, Ford dealers and Lincoln-Mercury dealers.

Q. is the code number reflected on a type of card which is issued to each of your dealers, something like a credit card?

A. I don't know specifically the form we do get it to our dealers in.

Q. You don't know that?

A. No.

Q Back in 1968, was there a code number assigned for pickups to be made by the FLM company?

A. I believe there was a second code number given to Central Lincoln-Mercury.

Q. For pickups to be made by the FLM company?

A. The issuance of a secondary code number does not necessarily relate to pickup.

Q I am not asking about necessarily. I am asking you in this case, did not Ford issue that second code number at the request of Central for pickups to be made by the FLM company, the plaintiff in this case?

A. My recollection is that there was a request for a secondary code number. I do not recall the specifics as to whether it related to pickups.

Q Have you looked? Have you had occasion to look in your file as to the origination of the second code number for Central?

A. Yes, I have.

Q Did you find correspondence bearing upon that?

A. I recall the correspondence, and I am unable to recall the specific of your point.

Q Do you have that correspondence with you?

THE WITNESS: Mr. MacCrate, is that present?

MR. MAC CRATE: I believe both the plaintiff and the

Defendants have marked for identification this correspondence.

MR. JULIEN: I know what we have marked. Have you marked such correspondence?

MR. MAC CRATE: It is your Exhibit 10 and 11 for identification, and it is our Exhibit X-11 and X-12 for identification, and they are the same documents.

MR. JULIEN: Your Honor, 12 for identification -- 11 and 12 for identification I offer in evidence.

MR. MAC CRATE: Those are X-11 and X-12.

THE COURT: Let me see them, please.

(Pause)

THE COURT: It probably doesn't make a lot of difference, but this is your case and you ought to have the exhibits you introduce marked as plaintiff's exhibits.

You have a plaintiff's exhibit 10 which is the same as Defendants' Exhibit X-11. Why don't you introduce Plaintiff's Exhibit 10?

MR. JULIEN: I simply wanted their copy because mine is a photostat furnished by them, which is absolutely difficult to read. It is almost indecipherable. If we could substitute the other for this --

THE COURT: We can get a legible document, but let's have -- is there any objection to plaintiff's Exhibit 10?

MR. MAC CRATE: No.

THE COURT: It is received.

(Plaintiff's Exhibit 10 received in evidence.)

THE COURT: You wanted a second document?

MR. JULIEN: Exhibit 11. This one is decipherable.

MR. MAC CRATE: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 11 received in evidence.)

Q Have you seen Plaintiff's 11 prior to this time, and is that the document you referred to before as something you had read?

A Yes, I have seen that.

Q Was that the letter you were referring to before as the one you had seen in your file?

A I had this and a transmittal of this to our office.

Q That I think is Plaintiff's 11.

Is that the letter you referred to as the letter of transmittal?

A Yes.

Q Following the receipt by your company of 10 and 11, Plaintiff's 10 and 11, was there the additional code number assigned pursuant to these letters?

A It is my understanding there was.

THE COURT: That code number, do I understand correctly, was a separate code number relating to FLM's purchases of crash parts from Central?

THE WITNESS: It would be a second code number assigned to Central Lincoln-Mercury?

THE COURT: For the purpose of dealing with the sales by Central to FLM, right?

THE WITNESS: Yes.

Q By the way, sir, I notice in Plaintiff's Exhibit 10, there is reference to a person Joe Collura. Is that a name with which you are familiar?

A I can't recall a Joe Collura.

Q Anywhere in your file, as reviewing it or preparing for this case, did you come across that name or any explanation of who he might be?

A If I did, it brought no awareness to me.

Q From that time on after the issuance of this new code number pursuant to 10 and 11, these two letters, were items picked up at your distribution centers by FLM under this code number?

A Reading the files, it is my understanding we did.

Q By the way, your distribution center is where for crash parts?

A. Teterboro here in the New York area.

Q. That is Teterboro, New Jersey?

A. Yes.

Q. Was there a practice back in '68 and '69 and even prior to that time where Ford would have the right to and did audit the books of some of its dealers?

A. Yes.

Q. When we talk about Ford, for the moment please bear in mind we are talking about either of the defendants or both of them.

A. Ford Motor Company and Ford Marketing Corporation.

Q. For the time being.

Was this right of audit something which was afforded the defendants Ford under the franchise agreements or arrangements with the dealers?

A. My recollection is there are, in the general clauses of our contract, there are spelled out conditions under audit. I am getting that from recall. I do think it is spelled out in our sales agreement.

Q. If Ford wanted to audit a dealer, it had the right to do so; is that right?

A. That is my understanding.

Q. In the year 1968, did Ford order an audit of FLM Collision Parts, the plaintiff in this case?

A. In 1968? I don't recall.

Q. Did it order an audit of FLM in 1969?

A. Any audit we ordered would have been on Central Lincoln-Mercury. There was an audit of Central Lincoln-Mercury in the fall of 1969.

Q. Was there an audit of FLM?

A. When they audited Central --

Q. Was there an audit of FLM?

A. As part of the Central audit in 1969.

Central Mercury, apart from FLM, had other wholesale customers, did it not?

A. Yes, I assume so.

Q. Did you audit, or was an audit ordered with respect to any other of the customers of Central?

A. I don't know.

Q. Have you looked into that?

A. I have not looked into that.

Q. No other customer of Central had an additional code number such as that which had been assigned after these communications which have been marked Plaintiff's 10 and 11; is that right?

A. To my knowledge.

Q. The answer is yes?

A. Yes.

THE COURT: No other what, no other customer of Central had such a code?

THE WITNESS: Central had only one additional code number, and that was for the sales that Central made to FLM.

Q Your company had no provision in its franchise agreements entitling it to audit the books of account of customers of its dealers, did it?

A I don't have any specific recall on the sales agreement as it applied to those auditing rights.

Q I am talking about the frahcnise agreements.

A That is what I am speaking of.

Q There was no provision for any audit of customers of your franchise dealers?

A I don't know.

Q You don't know that even now?

A That is correct.

Q have you ever seen, with the exception of FLM, an audit made of franchise dealers' customers?

A None that has come to my attention.

Q Would such audits come across your desk?

A A summary of the audit comes across my desk.

Q I am talking about audits made of franchise dealers.

A Yes.

Q They all come across your desk?

A A summary.

Q Other than FLM, you have never seen another summary of a dealer, haveyou?

A I can't recall any.

THE COURT: I am not sure what was done in 1969.

MR. JULINE: I am devoting myself to that a bit more, your Honor.

THE COURT: All right.

Q In 1969, auditors in the employ of or selected by Ford Motor Company went to the premises of FLM and examined their books; is that correct?

A That is my understanding.

Q And one of the purposes for the examination of FLM books in 1969 was to ascertain whether or not certain incentive, wholesale incentives which had been allowed were for customers who legitimately qualified as wholesale sales; is thatnot so?

A That is correct.

THE COURT: I just don't understand it. One of the purposes was to determine what?

MR. JULIEN: Was to determine whether incentive allowances received on sales were wholesale sales, actually were wholesale sales so far as FLM books are concerned.

THE COURT: I don't know where that gets me.

MR. JULIEN: I will go further on it, your Honor.

Q There are and there were certain incentive allowances --

THE COURT: Sales by whom? Can you tell me in your words what was the purpose of the audit?

THE WITNESS: The purpose of the audit was to determine whether wholesale incentive claims submitted by Central Lincoln-Mercury were in fact in accordance with our policy.

THE COURT: What was the policy that you were trying to find out whether it was in accord with?

THE WITNESS: The incentive has to do with whether is it an eligible part and whether it is an eligible customer that the part was sold to.

THE COURT: What was the particular issue at the time?

THE WITNESS: The sales from Central Lincoln-Mercury --

THE COURT: What caused the audit? What was the need of audit? Was it a problem of the right number of dollars?

THE COURT: In the Comptroller's office they have an activity where they have a system that identifies those customers that appear to be submitting claims inconsistent with our policy, and that is the universe that they then concentrated the audit on. In such a review, Central Lincoln-

Mercury was flushed out as a candidate for audit.

THE COURT: What was the problem? Were they afraid of what?

THE WITNESS: The way they determine the people to audit, they compare the total wholesale incentive claim against the parts they have purchased that carry wholesale incentives so they have the total universe of the parts purchased by a given dealer that they can claim on.

Then they compare the parts to it, and they determine whether the parts claimed are too high.

THE COURT: Was there an issue at this time whether FLM was actually repairing cars or whether FLM was reselling to repair shops?

THE WITNESS: At the point Central Lincoln-Mercury came up, there was no knowledge. The auditors had no knowledge of FLM.

MR. JULIEN: I have to move to strike that answer, what the auditors had knowledge of.

THE COURT: You are asking him a question that calls for hearsay anyway.

In other words, there wasn't any issue at this time about FLM's function of reselling versus some other function by FLM, right?

THE WITNESS: When you say at this time, the point

that Central Lincoln-Mercury was identified for audit?

THE COURT: In 1969.

THE WITNESS: AT that point in 1969, Central was selected because of their claim rate.

THE COURT: Because it was so bad?

THE WITNESS: Yes.

THE COURT: What was actually done in connection with this audit?

THE WITNESS: They went to Central Lincoln-Mercury, as I understand it from reading the summary, and they saw a very large number of the sales involving wholesale incentive going to FLM.

THE COURT: Then what was done?

THE WITNESS: They went to FLM to determine just what was FLM and where did those parts go.

THE COURT: What did they find out?

THE WITNESS: They determined that FLM had sold them to customers that we would consider to be eligible wholesale customers, independent repair shops, body shops, etc.

THE COURT: Then what was done?

THE WITNESS: As I recall, there was a very -- some very minimal charge-back for some sales where there was an ineligible customer --

THE COURT: You mean ineligible customer of FLM?

THE WITNESS: That is right.

THE COURT: Was anything else done?

THE WITNESS: As I recall, just a modest charge-back to Central Lincoln-Mercury.

THE COURT: Go ahead.

Q Was this the kind of audit which you call a clean audit?

A Yes.

Q By clean, you mean that it showed no irregularities of any kind?

A I use the term clean if there is a very small charge-back. It was practically like no charge-back at all. A very modest one.

Q So the audit disclosed no substantial irregularities of any kind?

A That is correct.

Q Of course your company had known, since the interchange of correspondence which has been marked 10 and 11 in evidence, your company knew as far back as September of '68 that FLM was purchasing parts and selling them wholesale under this new code number; is that correct?

MR. MAC CRATE: Objection.

A It is not right.

MR. MAC CRATE: Objection to the form of the

question, knowledge of a company.

THE COURT: Overruled.

Q They had already received this letter?

A The letter you have in your hand, this letter.

Q That is number 10.

A That letter was in the district sales office. It was not in Detroit where the decision was made to put the second code number on.

Q Mr. Witness, Exhibit 11 transferred that very letter right down to Detroit, did it not?

A I never saw it there.

Q I didn't ask you that. I ask you whether this covering letter transmits right to Detroit the request of Central that this code number be issued to FLM which is transacting a volume of business well over a quarter of a million dollars a year.

MR. MAC CRATE: Objection. The examiner has quite improperly characterized his question.

THE COURT: I can read the letter.

Q The audit made on this occasion of FLM's accounts indicated that it was selling wholesale to eligible customers; is that right?

A Basically, yes.

Q By eligible, what do you mean? Who fixes the

terms of eligibility?

A. In our wholesale incentive policy, we spell out eligible customers and ineligible customers.

Q. By "we" you refer to Ford?

A. That is correct.

Q. What did you spell out as eligible customers?

A. Independent repair garages, gas station repair shops, independent body shops. They would fall in the category of eligible customers. They are retailers.

Q. Again, your examination of the FLM books on that occasion showed that that was the type of customers that FLM was selling to?

THE COURT: We have had that four times. I get the point. Let's not repeat.

Q. This summary of the audit made on this occasion of the FLM books, that came across your desk, did it not?

A. I am sure it did. They all come over my desk.

Q. Approximately when in 1969 had this audit taken place?

A. It was late '69, around about November, as I recall.

Q. Have you seen the summary of that audit?

A. As I indicated, I am quite sure that summary went over my desk.

Q Have you seen it recently?

A Yes.

Q In preparation for this trial?

A That is correct.

THE COURT: Mr. Rowland, what were you in 1969 and 1970?

THE WITNESS: In august 1968 I was made the general sales manager for Ford Parts Division, the job I now have.

Q By the way, was the reason for the audit on this occasion because Central was doing such a large volume business?

Was that the reason for the audit?

THE COURT: He already answered that. Let's not have so much repetition. We will never get finished.

MR. JULIEN: 96 for identification, if your Honor please.

Q is this the summary of the audit to which you referred?

A Yes, it is.

MR. JULIEN: I ovver it in evidence.

THE COURT: Any objection?

MR. MAC CRATE: No objection.

***** (Plaintiff's Exhibit 96 received in evidence.)

Q Following November of 1969, did FLM continue

to pick up at Teterboro items which it had purchased from Central under that additional code number which had been assigned to it?

A. To my knowledge, yes.

Q. How long was this practice continued where under the separate code number FLM continued to pick up its merchandise purchased through Central?

A. My recollection on that is through December of 1970 and maybe into January of '71.

Q. Was there another occasion when Ford called for or arranged for an audit of FLM's books?

A. Central Lincoln-Mercury was audited in the fall of 1970.

Q. My question is, was FLM audited?

A. FLM was part of that audit of Central Lincoln-Mercury in the fall of 1970.

Q. Once again, was that a clean audit?

A. Yes, it was.

Q. Did it reveal to you the volume of business which FLM was doing through Central in terms of sales volume?

A. My recollection on that summary report, I looked to see what was the amount of the charge-back, and I don't recall getting any feeling for volume from it.

Q. I don't mean whether you got the feeling, but

this is reported by the auditors?

THE COURT: Is it a summary?

THE WITNESS: Yes. I don't get the detail. I get a brief, usually a couple of pages.

Q The audit itself is available to the Ford officials and it is keptin their records, is it not?

A By the Ford officials, you are ferring to who?

Q The Ford Company.

A The audit of the nature we had in November of 1970 would be retained normally in our division.

MR. JULIEN: 14 for identification, your Honor.

Q Is this the summary which you received concerning the November 1970 audit?

A Yes, that is the summary I received.

MR. JULIEN: I will offer that.

MR. MAC CRATE: No objection.

(Plaintiff's Exhibit 14 received in evidence.)

THE COURT: May I see 14 and 96, please?

(Pause)

THE COURT: Can you tell me from Exhibit 14 what was the code number for Central, the regular code number for Central and the code number for Central with respect to

its sales to FLM? Are those indicated on the front page of 14?

THE WITNESS: Yes, they are identified up here, Lincoln-Mercury dealer, 2001 Coney Island Avenue, Brooklyn, New York, parts code 11283, and Central Lincoln-Mercury corporation, 416 Saw Mill Road, Yonkers, New York, dealer parts code 13430.

THE COURT: And the reference to Saw Mill River, Yonkers, was really to FLM?

THE WITNESS: Yes, that is correct.

THE COURT: On 14 the amount of wholesale incentive discounts claimed is listed, is it not, in that first set of figures? It indicates in 1969 $30,887 was claimed for the sales to FLM?

THE WITNESS: Yes.

THE COURT: In the eight months ending 8 /31/70, $55,679 was claimed under the wholesale incentive discount with respect to sales to FLM during that period, right?

THE WITNESS: Correct.

THE COURT: And you knew the percentage, so if anyone wanted to figure out the total sales involved, could they do it or couldn't they?

THE WITNESS: You are referring back now to how I indicated we determined who we were going to audit?

THE COURT: No, I am just asking, if someone wanted to find out the volume of sales that related to this $55,000 discount, could they figure it out by knowing the percentage of discount, then do a mathematical computation?

THE WITNESS: They could come very close. Typically, the incentive is 25 percent. With that number, they would be able to factor into approximately what the sales were.

THE COURT: And you are talking about sales from FMC to Central and that is what the discount is given on?

THE WITNESS: From these numbers, we could go back into the sales that Central made to FLM.

THE COURT: Let's just say, for purposes of argument, $56,000. Whatwould you do?

THE WITNESS: Is the amount of the wholesale incentive claim?

THE COURT: Just rounding it off.

THE WITNESS: And you would want to find out what that represented in parts sales?

THE COURT: Could you figure out from that the amount of parts sales by Central to FLM?

THE WITNESS: Yes, that would represent approximately 25 percent.

Q 25 percent represents the incentive allowance?

A. The average wholesale allowance is 25 percent taken off dealer net, so if you have the amount of incentive paid, and you know that represents 25 percent off dealer net, you then can factor into what the dollar amount of parts sales were at dealer net.

THE COURT: Dealer net means after the discount?

THE WITNESS: That is the discount we sell to the dealer, the billing price to Central Lincoln-Mercury.

THE COURT: Before or after the discount?

THE WITNESS: Before the discount.

Q. You sell to the dealer at a price which is a percentage off list; isn't that so?

A. We sell to the dealer, we refer to it, at the dealer price or dealer net price.

Q. That is a percentage off list price, is it not?

A. Your terminology is a little strange to me. I don't want to confuse this issue, and I want you all to understand it.

For example, it would be helpful if I gave an example of the dollar part.

Q. Go ahead.

Q. A part that would have a retail price of one dollar would typically carry a 60-cent dealer price.

Q. That is forty off?

A. That is a forty percent margin. The 60-cent dealer price, that is the price at which we figure our incentive from. The stock pad incentive and the wholesale incentive is figured off of the 60 percent. The 25 percent by making reference to here, comes off of that level.

Q. By 25 percent, are you including within the ambit of the 25 percent the obsolescence or the stock order and the return of merchandise percentages too? Is that 25 percent for all?

A. No, sir. I am using 25 percent as just a rough average of just the wholesale incentive on crash parts.

Q. After the 40 percent off of list, then when the dealer sells it wholesale, he gets an additional percentage off, does he not?

A. When the dealer sells --

THE COURT: That is exactly what he said. I don't know why we have to repeat so much. Why don't we go on to something new?

Let's take a short break.

(Recess.)

BY MR. JULIEN:

Q. I am showing you a document heretofore marked 17 for identification, and ask you whether you recognize that to be part of the worksheets of one of the auditors who was

engaged in this examination of the books and records back in 1970, books and records of FLM and Central?

A. I have read this.

Q. That is what it is?

A. It relates to an audit and I remember when I read it, not being able to identify it at the period of time.

Q. Dles it relate to one of your audits?

A. Yes.

Q. So far as you can recall, or by looking at your own summary or the summary which you received, does that relate to the 1970 audit?

A. If I could have the 1970 audit. Could I see the 1969 audit?

MR. JULIEN: Could we take that as a concession to save time and I will offer it, Mr. MacCrate?

MR.MAC CRATE: Of course the difficulty is, Mr. Rowland is not an auditor.

MR. JULIEN: I am asking you, to save time.

MR. MAC CRATE: Yes, we will so state.

MR. JULIEN: We will offer 17 for identification.

MR. MAC CRATE: No objection.

****** (Plaintiff's Exhibit 17 received in evidence.)

MR. JULIEN: With respect to 33 for identification,

are those the worksheets connected with the 1970 audit?

MR. MAC CRATE: They appear to be.

THE COURT: Any objection?

MR. MAC CRATE: No objection.

(Plaintiff's Exhibit 33 received in evidence.)

Q With respect to these documents which had come across your desk, specifically 14 and 96 in evidence, that is, the two summaries --

A Which one is 14 and which is 196?

Q You were then well aware that this was, FLM was an independent wholesaler? You knew that?

A In the 1969 audit, yes, and also for '70.

Q You knew that wholesale incentive allowances were being paid on those sales made to FLM by Central; you knew that?

THE COURT: We had this fifteen times, and I don't care if Mr. Rowland was aware or not. The documents are in the Ford files which show that the arrangement between Central and FLM is there, known. If they didn't know it, they had notice of it, and what difference does it make?

MR. JULIEN: I will withdraw that question.

THE COURT: What did they do about it is really the question, and that is pretty well stipulated.

MR. JULIEN: Did your Honor see, with respect to

Plaintiff's 96 the final page dealing with closing conference? Did you read that?

THE COURT: Right.

Q Did there come a time where your company revoked the code card or code number which had been assigned to sales to be picked up by FLM?

A We cancelled Central's second code number.

Q When was that?

A December 1970 or January 197, right in that time frame.

THE COURT: Late '70 or early '71?

THE WITNESS: I believe we had a schedule for cancellation and I think the effective date -- for December and I think it ran into January '71.

THE COURT: That is the one for Saw Mill?

THE WITNESS: Right.

THE COURT: Why wasn't this stipulated? It seems to me we have spent the whole morning on the most routine facts, when the audits occurred, the granting of second code numbers, the cancellation of code numbers, and there is no reason for any testimony on this. There is no issue of credibility. You are asking this man questions about things that are matters of record. He hardly has any personal knowledge or memory. I wouldn't expect him to. What is

the point of a trial on this?

MR. JULIEN: He does have some personal knowledge.

THE COURT: If you were going to rely on these facts, why didn't you present them to Mr. MacCrate, get them stipulated? That is the whole purpose of a pre-trial procedure. There is no use to have a witness testify about things that are a matter of record. Wasn't my request conveyed to you to have the facts of this kind stipulated to?

MR. JULIEN: I didn't think, if vour Honor please, that Mr. Rowland, who does have personal knowledge of these matters, ought not to be interrogated.

THE COURT: Is there anything that has come out this morning that is not completely undisputed by everybody? Mr. MacCrate isn't denying any of these materials, and he would readily stipulate to them if you would ask him to do it.

MR. JULIEN: I am getting to the point where the purpose of the revocation of the code number and the purpose of arranging a new kind of customer eligibility has to do solely with the elimination of my client, and that is why I think these questions --

THE COURT: I haven't heard anything about that so far.

MR. JULIEN: I am coming to that.

THE COURT: Let's get to that.

If you would hold in your hand and assume in the facts stipulated to, and you can base your questions on the stipulation, and go from there; but don't repeat things that are stipulated, and if you have things that are matters of record, won't you ask Mr. MacCrate if he won't stipulate, which I am sure he would do, about things like giving or revoking code numbers, without wasting time trying to get a witness to testify about it.

Q Was FLM the only wholesaler not franchised by Ford in the New York area during the years1969, 1970, 1971, and 1972?

MR. MAC CRATE: I object.

THE COURT: Sustained.

MR. JULIEN: Might I know the grounds of that objection?

THE COURT: There are obviously lots of other wholesalers. Couldn't you make your question a little more precise?

MR. JULIEN: I am talking about wholesalers dealing in crash parts.

Q Was FLM the only wholesale dealer in crash parts other than your franchise dealers during the years '68, '69, '70, and '71?

A. I don't know.

Q. Do you know of any others?

A. I recall one audit charge-back. I don't recall the dealer or the precise time, but I recall an audit charge-back having to do with some parts sold to somebody who would be considered a wholesaler.

Q. Just a vague recollection?

A. I recall a chargeback related to what I think probably was a wholesaler.

Q. This is a single transaction you are taking about?

A. I can't recall.

Q. When did that occur, approximately?

A. I will have to give you a pretty broad range: the '68 through '71 period, somewhere through there.

Q. You mean this single transaction occurred during thatperiod?

A. I have not said it was a single transaction. I have a vague recollection of another wholesaler.

Q. What was his name?

A. I don't know.

Q. With whom did it deal?

A. The name of the dealership, I don't recall. It was in the east.

Q. Was it you who decided that the code card which had been assigned for deliveries to FLM was to be revoked?

A. I took the action on the recommendation of the auditor.

Q. You made the decision?

A. Correct.

Q. When did you make the decision?

A. It was in late 1970.

Q. Can you fix it with any more certainty than that?

A. It would have been following the audit of 1970. As I recall, I saw that report around Nomveber.

Q. At that time, was FLM an eligible customer, wholesale customer for crash parts?

A. Yes.

Q. And continued to be an eligible customer for crash parts until some time when Ford revamped its rules and regulations concerning eligible customers; is that right?

A. We had a policy change July 1, 1971.

Q. So even after your revocation of the separate code card for deliveries to the concern up in yonkers, did FLM continue to make purchases?

THE COURT: That is stipulated to.

Why did you revoke the second code number, Mr. Rowland?

THE WITNESS: It was not in keeping with our policy.

THE COURT: It had been in effect for some years, I guess since late 1968, correct?

THE WITNESS: Correct.

THE COURT: Why wasn't it in accord with your policy? Your policy for three years had been to allow them this second code number.

THE WITNESS: It was actually outside of our policy for the entire period. The original letter coming into Detroit requesting a second code number for Central did not reveal the facts to Detroit as they actually were.

MR. JULIEN: I have to object to that answer and ask that it be stricken.

THE COURT: Motion denied.

Can you explain?

THE WITNESS: The basic issue on a second code number is that the second code number is issued to a dealership who has a separate operation, but it is wholly owned by the dealer.

Example, we have many Ford dealers who have both a passenger car franchise and a heavy truck franchise. They might elect to have their heavy truck facility located apart from

their passenger car facility.

To facilitate their dealing with us, they will ask for a separate code number so that all parts that we sell to them for the heavy truck business would be separate from the code number we sell them their parts for the passenger car operation.

So the underlying rule is that the second code number is for an operation owned by the dealership.

THE COURT: Does this kind of a code number relate solely to the granting of incentive discounts?

THE WITNESS: No, your Honor, it is totally unrelated.

THE COURT: It is just a means of identifying an account for billing?

THE WITNESS: Correct.

THE COURT: If a dealer does some repairs of its own and sells some parts to some repair shops, does both kinds of business, that dealer will usually have just one code number for all its purchases from Ford, right?

THE WITNESS: Yes.

THE COURT: What are the circumstances that you say, under your policy as correctly interpreted, would allow for a second code number?

THE WITNESS: I will try to recall the policy. I am not really close to the words of it, but dealers who do a

lot of government work will request a second code number so they could isolate that Government business.

THE COURT: What do you mean do a lot of government work?

THE WITNESS: Sell a large volume of parts to the government.

THE COURT: What are some other instances?

THE WITNESS: Another instance, if a dealer were to have a very large fleet customer where he wanted to segregate his sales to that fleet customer, I believe that is in our provision.

The example I made of a franchised Ford dealer who also had trucks where he might want to physically separate his passenger and truck store and,in order to keep his billings straight with Ford Company, we might issue a second code number.

THE COURT: You are talking about repairing trucks?

THE WITNESS: This would be, for example, where he would split -- on the example I gave you on tractors, he might have a separate facility for total truck operation, sales, service, and repair.

THE COURT: In the truck operation he might do some repairing of trucks, and he might sell truck parts to other shops who repair trucks?

THE WITNESS: Yes, he would do everything.

THE COURT: And the same for the car side of it?

THE WITNESS: Right.

THE COURT: Do I understanding following the 1970 audit you came to the conclusion that the granting of a second code number for Central sales to FLM was contrary to your policy?

THE WITNESS: That is when I took the action.

THE COURT: Is that right, you came to your conclusion?

THE WITNESS: To answer you perfectly accurately, that is when I took the action, in May of 1970. It was brought to my attention it was probably not proper.

THE COURT: Who brought it to your attention?

THE WITNESS: The district sales office in New York.

THE COURT: Who in the district sales office?

THE WITNESS: I believe it was Jim Rose, through the regional manager.

THE COURT: I would say to you, Mr. Julien, if you are going to get into the history of the revocation, go into the history, not just a few conclusory questions, the conversation with Rose and the whole thing.

Q This rule or policy that you told his Honor about, is that a written policy?

A. which policy are you referring to?

Q. About when second code numbers are afforded one of your dealers.

A. That is a written policy.

Q. You have that?

A. Mr. MacCrate has it, I am quite sure.

MR. JULIEN: May I have it?

MR. MAC CRATE: I don't know that we have it in manual form, but I have seen portions of it reproduced in some of the documents that you and I both have, Mr. Julien, and I will attempt to locate it.

THE COURT: Let's go ahead without it and we will come back to it.

Q. In May of 1970, this conversation you had with Mr.Rose, who is Jim Rose?

A. District sales manager in New York.

Q. Did Mr. Rose report to you --

THE COURT: Couldn't you possibly ask him what happened, let him tell the story instead of you testifying?

MR. JULIEN: With the utmost of respect, if your Honor pleases, I have a hostile witness on the stand affiliated with the defendant, and I am entitled to ask him leading questions.

THE COURT: Can you tell me what happened? Tell me what happened, the whole story about the revocation of the second code number.

THE WITNESS: In May 1970, a rather thick file was transmitted from the New York district through the region into the office of my assistant with a copy to me. Contained in it was a listing of several dealerships that had second code numbers, and the essence of the communication was, "we have reason to believe that all of these code numbers are not consistent with our policy."

My recollection is there were about seven dealerships that had a code number listed in that file. Central Lincoln-Mercury was one of them.

The investigation that ensued -- I was not delegated that, to find out what this was all about.

THE COURT: Who did you give that direction to?

THE WITNESS: I don't recall specifically. I would guess, if I had to guess, I would probably say my assistant, because the original of the file went to him.

THE COURT: What is the name of your assistant?

THE WITNESS: Mr. Stroh.

THE COURT: What direction didyou give to Stroh?

THE WITNESS: The direction I would have given, "Let's find out everything that needs to be determined, and

find out whether the second code numbers are proper."

THE COURT: What happened then?

THE WITNESS: The next thing in the file that helps my memory is the audit report for the November audit which indicates that audit was at my direction, with specific direction to find out the exact relationship between FLM and Central LIncoln-Mercury, and when that audit report came back identifying that relationship with the recommendation that the second code number be terminated, I took that action in December.

THE COURT: Was this a written recommendation?

THE WITNESS: Yes, it was.

THE COURT: Was this recommendation in Exhibit 14?

MR. MAC CRATE: Mr. Julien requested --

THE COURT: Hold that for just a minute.

On this one point, the Exhibit 14 which is the memo to yo bout the 1970 audit indicates at the time that the second code number was issued, whoever issued it in Detroit was under the impression that it covered sales by Central at an operation of Central on Saw Mill River Road, Yonkers, New York, right?

THE WITNESS: Yes.

THE COURT: Do I understand that the reason you revoked the second code number is the fac tthat you found out

that the operation on Saw Mill River Road in Yonkers was an operation of FLM, not an operation of Central?

THE WITNESS: We found that Central had no control, no relationship over FLM.

THE COURT: And you are saying that is the reason you revoked that second code number?

THE WITNESS: Yes.

MR. MAC CRATE: Mr. Julien, you requested the policy material with respect to customer parts code numbers. It is your Exhibit 85.

(Continued on page 53.)

Q In the 1969 summary audit, Exhibit 96, you were aware at that time, were you not, that FLM was a separately, privately owned wholesale parts company?

A In reviewing the file for this case, if I had carefully looked at that audit report --

Q I am not asking you that. I am asking you, when you saw the summary by your auditors in 1969, it apprised you, did it not, that FLM was a separate and privately owned wholesale parts company?

A Information was available to me to that extent. I do not have a recall of becoming aware of a policy being circumvented.

MR. JULIEN: I ask that be stricken as not responsive.

THE COURT: Motion denied.

Q You do read these summaries, do you not?

A I scan them.

Q In the 1969 summary, you were told by your auditors that FLM had no corporate connection with the dealership; correct?

A It is in that audit report.

Q In addition to that, when the additional code number was first requested,'way back in '68, your company was advised at that time that this was a corporation known as

FLM Collision Parts, formed by Mr. McKee and Andidero, which would be located at this Yonkers address. You were informed about that?

A This letter did not come to my attention.

THE COURT: Which letter?

MR. JULIEN: 10.

A (Continuing) That application I saw first in May of 1970.

Q Whosoever occupied either your position or the position to make decisions back in the home office in Detroit, he had that information right in his files?

A I don't believe that is correct. I believe that the one exhibit you have, if I could see it --

Q Which one do you want to have?

A The one with the right hand on top.

It is my understanding this is the letter on which the decision was made to revoke the second code number to Central Lincoln-Mercury.

THE COURT: That is Exhibit 11?

MR. JULIEN: Yes.

Q 11 was an inter-office communication from your district sales manager to Guy Stevens. Was he in charge of operating methods and systems of the parts depot in Detroit?

A I would assume so from the title. I don't know Mr.

Stevens.

Q Did anyone ever say to you or did you ever see any document that said, in words or substance, that FLM is a division of Central? Did you ever see that, anywhere?

A The exhibit you just looked at, number 11, that particular letter inferred --

Q I am not asking you about inferences.

A My response to you is that that letter is the closest thing I can identify.

Q And that relates to 11, which is the intercommunication between people in Ford itself?

A Correct.

Q After the audit of 1969, did anyone ever say to you, in words or in substance, "This is just an arm, FLM is just an arm or a subdivision of Central"?

A The material received in May of 1970 pointed out.

Q That it was not?

A That was the second code number reference I made where they decided about it not being qualified.

Q My question is: did anyone ever say to you, in words or in substance, after your audit of '69, "FLM is only an arm of the Central company, one of its subsidiaries"?

Did anyone say that to you?

A Those words, no.

Q Before you revoked the card, you told us about a conversation with Mr. Rose. Was that conversation, in words or substance, about the fact that somebody else was applying for a code card for a wholesaler and complained that such a card had been issued to FLM?

A I know there were requests for other secondary code numbers. The specifics were not discussed.

Q And these requests were coming from dealers in the same New York area; is that right?

A That is my general understanding. I don't know the specifics on this question.

Q Was it your general understanding that one or more of the dealers was complaining that such a card had been given to FLM but that he was unable to get a card for his second customer?

A In reviewing the file of counsel, I heard of this.

THE COURT: Let me hear the question and answer.

(Record read.)

THE COURT: What do you mean by "second customer"?

MR. JULIEN: Of the additional dealer requesting a card other than Central.

Q You understood it that way?

A I understood your question to be: was there another one or more Ford dealer in the New York area asking for a

second code number? And I understand there were such requests.

Q And complaining that while they were not getting it, FLM had it?

A The only specifics I can recall with you here are what Mr. Mack went over with me, and I just know there were some complaints. There was at least a request for a secondary code number by another dealer.

MR. JULIEN: If your Honor please, during this particular portion of this witness' testimony, I am told that Mr. Rose has come into the courtroom. Could he be excluded?

THE COURT: Mr. Rose, wait outside, please.

I want to understand the significance of your question.

(To the witness:) Was it your understanding at the time you revoked Central's second code number that there were other dealers in the New York area that wanted second code numbers?

THE WITNESS: At the time that I revoked it, that was not on my mind. The thing on my mind was that an auditor had documented that FLM -- that Central Lincoln-Mercury had no financial interest in FLM; it was outside of policy. They recommended I cancel it, and I did.

THE COURT: What you are saying is, in reviewing the

Ford documents with Mr. Mack in connection with this trial, you have found indications that other dealers in the New York area were trying to get second code numbers and were complaining about Central getting a second code number where they could; is that right?

THE WITNESS: Yes. In trying to have a recall of whether I knew about that before reviewing it in the file, I just cannot bring back any specifics on anything I have received in writing. I don't recall any specifics or telephone conversations where someone said to me, "We have a lot of dealer relations problems."

THE COURT: Let me just ask you: as far as what you have learned in going over the thing with Mr. Mack, were these requests by other dealers related to situations like FLM?

THE WITNESS: I believe so, yes. In fact, my recall from the material I went over with Mr. Mack, I believe there was one situation where they thought that the code number that the dealer was asking for was specifically for FLM, but again, I looked at a lot of material, and I don't have real good recall on it.

THE COURT: Do you recall at the time of the events knowing about any other dealer wanting a second code number so that he could sell either to FLM or to somebody like FLM?

Do you have such a recollection?

THE WITNESS: At the time that I made the decision?

THE COURT: Right.

THE WITNESS: No; I don't.

Q Let's see if we can refresh your recollection.

In August of '69, was a request being made by Bernard Auto Parts for a second code number?

A This is part of the material --

Q Just yes or no. Was it?

A Would you repeat the question, please.

Q In August of '69, was a request being made of you by a different one of your dealers, Bernard, for a second code number for a wholesaler?

MR. MacCRATE: Objection. There is a reference to Bernard as a dealer. There is nothing in this record to indicate that Bernard is a dealer.

THE COURT: May I see that?

MR. JULIEN: Excuse me. You are quite right. Let me change the question.

Q Was Fordham Motors -- That is one of your dealers?

A I don't know.

MR. JULIEN: Will that be conceded, that Fordham Motors is a dealer?

MR. MacCRATE: I do not know Fordham Motors.

Q Will you look at this and see if it refreshes your recollection that Fordham Motors was requesting a separate code for Bernard Auto Parts back in August of 1969?

MR. MacCRATE: May I have an identification of the document?

MR. JULIEN: It is 35.

A This exhibit is a letter from the assistant district manager to a zone manager, and I saw it when Mr. Mack was reviewing the file with me.

Q Is it a fact that a request was being made by Fordham in '69, August of '69, for an additional code number for a firm named Bernard?

THE COURT: Apparently this witness doesn't know anything about it. You are reading from a document, and, again, this is the kind of thing that you should have asked Mr. MacCrate to stipulate.

MR. JULIEN: I am referring to what his state of mind was, as to which the Court and I have been questioning him.

THE COURT: Do you know anything about that?

THE WITNESS: I saw this when I went over it with Mr. Mack first.

Q Do you remember the name of the firm or firms that Mr. Rose talked to you about as trying to get code numbers for

wholesalers?

A I specifically indicated that Mr. Rose was not discussing this with me.

Q Isn't it a fact at the time you revoked this code number, the only wholesaler in this entire area of New York and its environs doing a wholesale volume business was the plaintiff in this case, FLM?

A To the best of my knowledge.

Q And you were aware, were you not, that these allowances which you give to wholesalers were being passed on by Central to some extent to FLM, its customer?

A These allowances we give to wholesalers?

Q Yes.

A Are you referring to Ford dealers?

Q Yes.

A Yes. I did understand that -- one of the audit reports reflected that: passed it along.

THE COURT: You understood basically -- I want to get the record clear, and I don't think you finished the answer.

Did you or did not not understand that Central passed along to FLM all or most of the whole sale incentive discount that Central received from Ford?

THE WITNESS: Yes. I remember it in one audit

report. I don't remember which one it was. I think it was the 1970.

Q As of that time, even when you ordered the revocation of the additional code, FLM was still an eligible wholesale customer, was it not?

A That is correct.

Q What is a wholesale customer? A customer purchasing for resale at wholesale?

A He was an eligible customer by the language of our wholesale incentive policy.

Q To purchase for resale at wholesale?

A Those particular words are not the words we use. Our words are, he was not ineligible according to the language of our policy.

Q So that your revocation of the code was not intended to make him an ineligible customer at wholesale?

A That is correct.

Q Now, did there come a time when company policy was revamped to as to eliminate FLM as an eligible customer for purchasing at wholesale to resell at wholesale?

A We changed our policy.

Q When?

A July 1971. So that the language would assure that when we paid a wholesale incentive to a dealer, that the

dealer in fact had performed the wholesale function, and in doing so, that did cause FLM to no longer be an eligible wholesale customer.

Q And that meant, of course, that anyone selling to him, selling to it, FLM, after the effective date of this change in policy, would not be able to secure the incentive, wholesale incentive; is that right?

A Our policy --

Q Is that right?

THE COURT: That is stipulated. I don't know why we are wasting time. Paragraph 20 of the stipulation and so forth. There are several paragraphs that make it quite clear.

MR. JULIEN: Has your Honor, from a reading of the stipulation, gotten the four --

THE COURT: I have read the stipulation.

Q As a result of the change in policy, would all four of the wholesaler benefits -- stock order discounts, wholesale incentive allowance, POP, parts obsolescence and a surplus inventory reduction program -- would that be lost to anybody, any one of your dealers who sold to FLM after the effective date of that change of policy?

A Break that question up into pieces. I can't deal with it like that.

Q You are clear that the wholesale incentive allowance

could no longer be afforded a dealer who sold FLM by policy?

A By policy.

Q The stockholder discount: could that be afforded to a dealer who sold FLM?

A Stock order discount: a dealer can do anything he wants with it. He earns it. We have no policy that tells a dealer what he can or cannot do with his stock order discount.

Q But you have a policy that tells a dealer what he may do with respect to his wholesaler incentive allowance?

A No; we have a policy that outlines under what conditions we will pay him a wholesale incentive. What he does with that is his own business.

Q That requires an eligible purchase from the dealer?

A It involves the eligible party, eligible customer.

Q From the date of your change, FLM was no longer an eligible customer?

A That is right.

THE COURT: We understand.

Q Parts obsolescence.

A The dealer would earn his parts obsolescence credits from us the way he always has.

Q That would depend upon the goods being in his hands upon which the parts become obsolete?

A Anything the dealer buys from us, he gets a five

per cent obsolescence credit on, no matter what he does with it.

THE COURT: A dealer selling to FLM might still earn the obsolescence parts protection program credit?

THE WITNESS: He definitely could.

THE COURT: Could a dealer selling to FLM earn a surplus reduction inventory credit?

THE WITNESS: Yes.

Q Relating back to your statement to his Honor about the policy relative to the additional code numbers, did you come across anything in the file that you saw referable to FLM and Central which you discussed with counsel, which indicated to Ford that Central was having FLM engage in government work in order to receive a code number? Was that representation made anywhere?

A I have no recollection of such a thing as that.

Q Did you ever see anything which indicated that it was represented to Ford by either Central or FLM or anyone on their behalf that FLM was a division of Central dealing with fleets?

A I have no specific recall on that. Your question was strictly fleets. I have no recall on that.

Q Did you see anything in any of the material that you saw either prior to or during your discussions with Mr. McKee

prior to the trial of this, indicating that it had been represented to Ford by Central or in behalf of FLM that FLM was a division of Central dealing with trucks?

A Truck?

Q Yes.

A No.

Q Did Mr. Stroh at your request make the investigation which you said you had asked him to do? Yes or no.

A I must qualify that. I don't recall specifically saying to Stroh to do it. I had someone investigate it, and my recall was, if I had to guess at who, I would guess at Mr. Stroh. I have no specific recall.

Q I understood that to be the name you gave his Honor just a few minutes ago. Who did make the investigation?

A It would have been done by the department managers in market representation and sales planning.

Q Don't you know who it was in this case?

A No; I don't.

Q Didn't you get any feedback from the investigator who did look into it?

A There was feedback.

Q Was it in writing?

A I have no specific recall on any pieces of paper I looked at on the subject.

Q Have you seen any such report preparatory to coming here to court?

A I guess I would ask to refresh my memory. I am unable to bring to mind anything in writing on the subject.

THE COURT: Are you talking about the investigation after the May 1970 report from Mr. Rose?

MR. JULIEN: Yes. I understood he asked Mr. Stroh to go out and make an investigation.

Q Am I incorrect about that, sir?

THE COURT: Go ahead.

Q Whoever did the investigation for you, and whether it was oral, or in its report to you, the thrust of the report was that FLM was a separately, privately held company, having no corporate connection with the dealership; isn't that right?

A That is ultimately what came out of it, along with a space for decisions in that same file.

Q It revealed succinctly what you had been told in the report, what your company had been told in the report back in '69, Exhibit Number 96; isn't that right?

A That was the '69 audit?

Q Yes.

THE COURT: We have been through this so many times.

Q How long did you continue to allow purchases to be made through Central by this wholesaler, FLM, after the revocation of the code?

THE COURT: That is all stipulated. Paragraph 24. Have you read the stipulation?

MR. JULIEN: Yes, your Honor.

Q Did you maintain a file either in your office or the district office down in New York for the FLM Company?

A I can't speak for the New York office. In my own office, the only file that comes to my mind was the May information sent to us by Jim Rose, which contained that secondary code number.

I really don't know how my secretary dealt with material that came through.

Q The information from Jim Rose, is that a document we have seen?

MR. MAC CRATE: It is 1 to 15 inclusive. You have pieces of it as 10, 11, 17, 34.

MR. JULIEN: May I see it in its entirety?

MR. MAC CRATE: I think it will expedite things if you look at your Exhibit 13 where it is all assembled.

A To answer your question, Mr. Julien, I don't know how my secretary may have set up a file on the subject.

Q Did you ever send for or look at a FLM file in your

home office?

A In preparing with our counsel, quite a lot of information on Central and FLM was brought to my attention. The origin of the files on it, however, I am not qualified to speak on.

Q Before changing the policy which resulted in FLM no longer being an eligible customer to sell at wholesale, were there any conferences or meetings of any of the officials of Ford so far as you know?

A On what subject?

Q On the subject of changing the policy with respect to eligible customers to receive incentive allowances.

A We had a very, very intensive study on the entire subject of wholesale incentives starting in '69 and going all through 1970, many, many meetings on the subject.

Q Were records kept of each of those meetings, sir?

A I can't honestly say. There were a lot of summations made of the programs we studied, gave thought to, but as to minutes, we don't operate on minutes. In our general day to day work, there are a number of documents that show, quite a number of considerations we were reviewing that had to do with eligible part, eligible customer.

Q I am just asking you whether there were writings?

A I am answering you. There were writings but I am

trying to respond to your question of minutes. Nothing I would say that were minutes.

Q At the time it was proposed to revamp policies so as to eliminate incentive discounts where a wholesaler purchased from your dealer, was there any record kept of that discussion?

A In the same context that I answered your last question. It was one of eligible customer. It was one of a multitude of things we were looking at and the amount of documentation in the record would be the same for that as for the other considerations.

Q Was one of the reasons that independent wholesalers were to be eliminated as eligible customers the fact they were in competition with your dealers?

A That was not the issue.

Q Was that something which was under consideration?

A Rephrase the question, I have lost track what I am responding to.

Q Was one of the things that was under consideration at that time in determining what the policy shall be with respect to eligible wholesalers, the fact that wholesalers were in competition with your franchise dealers?

A No.

Q Never discussed at all?

A It was not one of our issues.

Q Was it ever discussed at all?

A Not to my recollection.

Q Was there any discussion about the fact that wholesalers, independent, were operating in territories and areas where there were your franchise dealers? Was that discussed?

A None that I was a party to.

Q Had you received complaints from dealers with respect to the activities of FLM and the sales at wholesale by FLM?

A None of those were discussed in these meetings that you are referring to.

Q Had you received such complaints?

A I went through that before and I indicated to you in going through the file with Mr. MacCrate was when I had my memory brought back on that subject.

Q There had been such complaints, correct?

A The record shows there were, yes.

Q And they were before this revision of policy which took place in 1971?

A I don't know that. I don't have a recall on the dates of when those complaints might have been taking place.

Q In your review of the file with Mr. MacCrate for the purpose of this trial, how many such complaints did you come across?

A I would have to review the file.

Q Would you do that, please?

MR. JULIEN: Would you show him that file?

MR. MAC CRATE: Might I suggest over the luncheon recess, I can show various things to Mr. Rowland and he can identify to what he refers.

THE COURT: Go ahead with another area if you could, Mr. Julien.

Q This wholesale incentive allowance which you have told his Honor is twenty-five percent on identified items?

A Crash parts.

Q I am only talking about crash parts.

Was that a functional discount?

A Wholesale incentive is a functional discount.

Q Do you mean by that that the company itself, Ford, achieves a savings as a result of dealers engaging in wholesale work and that savings results in this functional discount afforded them?

A No, sir.

Q Well, was there a savings to the company, Ford, as a result of the wholesale activities of your franchise dealers?

A I don't know how to respond to that. We pay a wholesale incentive to stimulate dealers to wholesale parts and to give them an acquisition price so they can compete against other people in the market wholesaling the same type

of parts.

Q Of course --

THE COURT: Is that what you mean by a functional discount?

THE WITNESS: That is right. The wholesale incentive is what we pay a dealer to perform the wholesale function.

Q It is not dependent upon any savings to Ford, is it?

A No, it is not.

Q When you say "savings to others" --

A Would you rephrase that question. The word "savings" is improper.

Q You told his Honor about competition in the market with respect to the same kind of material or goods. All Ford crash parts are made just by the defendants in this case, isn't that so?

MR. JULIEN: That is in the stipulation, forgive me, your Honor. It is an old jury habit.

Q Other than your franchise dealers under your new policy, no one can buy wholesale from Ford; isn't that right?

A Now I understand. I am talking wholesale incentive in its entirety of which crash parts are just a part of and your questions are always in the context of crash parts only.

Q That is what we are concerned with in this case.

A Then let me go back over your questions with you.

Q No one else can buy at wholesale from Ford these Ford crash parts that we are talking about; is that so?

A We sell crash parts only to Ford and Lincoln-Mercury dealers and only Ford, Lincoln-Mercury dealers can receive crash parts.

THE COURT: I would like to break off now and we will adjourn in about five minutes.

There are some points that I think need further discussion in a briefing and I would like to just begin or have the lawyers begin considering these now because I hope to avoid a long process of post-trial briefing if we can avoid it.

My office is really beginning to get into the case so maybe there are things in the cases cited that I have not discovered, but I think on the Sullivan and Cromwell brief, it does not seem to me to come to grips sufficiently with what I think must be one of the central issues in the case and that is this: Let's assume that Ford makes no express direction regarding the resale price to be charged by its dealers to FLM or anybody else, and assume that Ford does not expressly forbid its dealers from dealing or reselling crash parts to FLM.

Still, don't you have a de facto resale price

arrangement or a de facto hindrance placed upon the ability and the willingness of a dealer to sell crash parts to FLM if Ford as stipulated, gives a substantial discount to its dealers when they resell to certain persons and refuses to give that substantial discount to its dealers when they sell to FLM; is it not unavoidable that the resale price will be substantially different when the dealers sell to other types of customers other than FLM and is it not unavoidable that these dealers will be discouraged or hindered from selling to FLM?

Again, maybe I have not gotten far enough in the case reading, but it does not seem to me that the talk about injecting FLM into the distribution system and so on really hits at the issue. I approach this as a question of whether the doctrine, particularly the doctrine of the Schwinn case, isn't violated by the setup you had here, even though it is not perhaps laid down in express terms.

MR. MAC CRATE: I believe we can satisfy you on this, your Honor, but I assume you do not want an argument on this point at this time.

THE COURT: I would appreciate it very much if the lawyers start thinking about this and just as soon as possible, if there is occasion for reason to give me a further memorandum, I would like to have that just as quickly as possible,

because I want to really work on the law contemporaneously with hearing the evidence.

MR. MAC CRATE: The element you have left out, so far as the factual element is concerned, is the price that FLM pays and the price a retail customer pays for parts, and you have not moved the part to the retailer when you sell to FLM. What you are doing is taking a piece of the wholesale function and the dealer assigns a piece to a wholesaler to FLM and he no longer acts then as a wholesaler, but he does this for a small stipend, an amount that is repeatedly negotiated upward over the history of this simply because of the cost to the dealer to handle the paperwork of the sales.

Now, unless you focus on the price paid by FLM to the dealer, you cannot place this into its context, but I think it is --

THE COURT: I do not think we have gotten all those facts yet. I am just starting. The facts I have right now are just the bare facts about the amount of the discount whether it is sixteen percent figured on one thing or twenty-five percent figured on another. It is a substantial discount.

Now, I start with that and I have the facts about that. It was granted for a certain period of time, then it was withdrawn as far as sales to FLM and it was granted when

the dealer sells to other people.

Now, I do not have the facts yet about what -- I do not have many facts about the dealers' prices to FLM, prices to other people and mark-up and that kind of thing which still remains to come, but I just cannot help stating this as an initial question, that on its face I think this might very well come within Schwinn. I think there may be factors in your defense that relate to the distribution system and all, but I think it would help me either in a discussion or in further memorandum to address it in a way, at least address it if you can to the way I pose it. That is, start with Schwinn, if that is a case you can start with, and see if this situation does not inevitably create enough of an influence on the retail price of the dealer to constitute de facto some kind of a resale price agreement.

MR. MAC CRATE: I think we can satisfy your Honor and we can certainly prepare something.

THE COURT: On this Robinson-Pattman thing, the indirect purchaser doctrine I don't think is so easy to dispose of. We do not have all the record in yet, but as I understand -- you have briefed a lot of the cases to finding indirect purchaser, and it does seem to me that at least prior to July of 1971, that a Court could find that FLM in some sense was an indirect purchaser; that at least parts of the

Ford organization knew that these one or two dealers were selling to FLM and knew the circumstances and intended that be so and knew that FLM was going to be competing with the dealers.

As I understand some of the FTC guidelines, that is enough to bring to bear kind of an indirect purchaser problem under the Robinson-Pattman Act. I do not know of any cases. All I am saying, I think it has to be analyzed a little more directly than has yet been done and to take into account this degree of knowledge on the part of at least some parts of the Ford organization.

You have a chain, and assume for purposes of argument that Ford knew that the dealers were reselling to FLM at a very small mark-up and that FLM was competing with dealers. Didn't you then have an indirect purchaser problem under the Robinson-Pattman Act at least up until July 1971 or even afterwards?

What is the situation after the July 1, 1971 change of policy as corrected by those investigations that were done and brought about the complete stoppage of the discount by at least late '72? It may be that that, in effect, constituted a refusal to deal which is permissible under the Robinson-Pattman Act.

What I am trying to say, Mr. MacCrate, I just find

that the situation is a little more sophisticated and complicated then we have yet briefed, so I would like to have just as thorough and searching analysis as possible under the Robinson-Pattman Act of how you treat the situation both before and after the July 1, 1971 change of policy.

As to the plaintiff, if you should prevail on liability, what is there in what you have given to me that can possibly tell me how to assess damages?

Are you suing for damages?

MR. JULIEN: Yes, your Honor.

THE COURT: I have not got one single word in any proposed finding of fact or brief dealing with the subject of damages.

I do not intend to carry this case for a period of months, and it seems to me you better get into me whatever calculations, and Mr. MacCrate ought to be able to see that.

MR. JULIEN: He has seen our financial statements.

THE COURT: I mean I need to have a brief on the law as to what legal basis there is for the different type of remedy you seek and how they are to be calculated and so forth. I have not got any of that and I need to have proposed findings of fact showing exactly how you would calculate damages, and I think you better get those in in the next day or so.

We will adjourn now.

MR. JULIEN: May I ask a question of the Court?

It was my understanding in trying a case of this type that after the conclusion of the hearing some of these things are pulled together, evidentiary, by means of a memorandum. For that reason I have not asked your Honor to take particular notice of certain sentences or paragraphs of the exhibits I have offered so far and had not intended to do that in the future, thinking I would bring it together in a memorandum to be submitted to you.

THE COURT: That is another subject we better cover. My feeling is, if it is at all possible, I like to decide the case either at the conclusion of the trial or very quickly thereafter. That is not always possible but sometimes it is, and it saves really a duplicative effort on the part of all of us. We get into the case at trial and then we drop it waiting for briefs and so forth. It is a duplication of effort to come back into something weeks or months later that we are into now.

I would hope, and I think it is possible, I do not think the case is that complicated, I would hope that I can follow the case as it comes in, look at the relevant parts of the exhibits and be briefed on the law as we go along, and I will pose to you any questions and I can decide the case

either at the end of the trial or get to work on a decision very quickly. That may not be possible but I hope it is and I will ask you to help me out.

MR. JULIEN: In that event, with respect to each of the exhibits, I will have to point out the parts I consider significant.

THE COURT: I do not think there is anything so complicated that has come in so far, but you do that.

Let's adjourn until 2:30 and we will run until 4 o'clock.

(Luncheon recess.)

rkbr 1

AFTERNOON SESSION

2:30 p.m.

M O R R I S J. R O W L A N D, resumed.

DIRECT EXAMINATION (Continued)

BY MR. JULIEN:

Q Mr. Rowland, the Crash Part Division of Ford, was that previously known as Autolite?

A Your term, Crash Part Division, there is no such thing.

Q The department handling crash parts in Ford, was that known as Autolite?

A It was known as Autolite Ford Parts Division, then it was changed to Ford Parts Division.

Q Just before we recessed, you recall you told me that the entry in the Exhibit 96 which is the 1969 survey concerning the separate privately owned wholesale parts FLM with no connection with the dealership, did not come to your attention? Do you remember saying that?

A I said that went over my desk and I was unable to recall certain details of it that you were speaking of.

THE COURT: Autolite Ford Parts Division you say became Ford Parts Division. What happened to

Ford Parts Division, is that still in existence?

THE WITNESS: Yes, there is a Ford Parts Division. We are now the Ford Parts Division and just prior to that, we were the Autolite Ford Parts Division.

Q You were aware, however, at the time of the receipt of Exhibit 96 that this separate coding number had been issued for the pickups by FLM, you knew that in '69, did you not?

A I am trying to think. In 1969 I don't recall an occasion where that would have come to my attention until the audit of '69.

Q Whether by the audit --

A It was contained in that audit of '69.

Q So you knew it at that time?

A The information was available to me at that time. I have no specific recall of thinking of separate code numbers at that time.

Q Weren't you just asked about that same awareness of the two or more code numbers in the examination which was taken of you on September 6, 1974 at page 71? Were you not asked this question and did you not then give this response --

MR. JULIEN: Line 10.

"Q Were you aware of Central Lincoln having two

or more than one code number prior to 1970 other than through the audit of FLM?

"A I was aware of it on that '69 audit. That is when I became aware of it."

Did you not say that just a few days ago under oath?

A I guess I must have said it.

MR. JULIEN: Your Honor, in keeping what I ascertained in my colloquy with your Honor just before closing, may I call the following to your attention in Exhibit No. 17 which you have not yet read although it is in evidence. This is the material of the auditor accompanying the 1969 audit. It is a handwritten document.

THE COURT: All right.

MR. JULIEN: I particularly wish to call your Honor's attention to the following paragraph contained therein.

"FLM Collision is almost one hundred per cent wholesale. The owners do not invite a retail business. Their basic customers consist of collision shops and service stations. Over 75 per cent of their business is in sheetmetal body parts. Information was not available at FLM Collision on the feelings of Ford and Lincoln

Mercury dealers in the immediate trade area on the establishment of a separate location by a dealer in another area who is in effect in direct competition with these dealers."

Q One of the things that Ford was interested in from your reading as one of the officers of the distribution parts of its business, was the question of whether or not these wholesalers were competing with established franchise dealers; true?

A It was brought out there. I spent no time --

Q I am not asking you what you spent. I am asking you from your reading of these documents and your knowledge of the documents in the possession of Ford, whether that was not one of the things they were interested in?

THE COURT: What does your question mean, from your reading of these documents wasn't this something that Ford was interested in? I could read the document, he could read them. Are you asking him to draw inferences or what? You can refresh the witness' memory or try to refresh his memory but I will not permit a lot of questions about asking him to interpret documents.

MR. JULIEN: I will put it differently, your Honor.

Q Does this refresh your recollection that in '69 one of the things that you were concerned, the defendants, were interested in, was whether FLM Collision was in fact competing with established franchise dealers in the areas serviced by FLM?

A When I read it, I read it as something the auditor was concerned about.

THE COURT: When you read it when?

THE WITNESS: I would have to assume I read it some time shortly after the audit. I have no specific recall on when I read that document other than I remember reading it with Mr. MacCrate. I have no specific recall --

THE COURT: I don't think it has been established that you did or did not read the particular document Mr. Julien is referring to and did you read it at or about the time of the '69 audit.

THE WITNESS: I can't answer whether I read it specifically at the time of the '69 audit. I did read it with Mr. MacCrate in preparing for this trial.

THE COURT: To me it is just a source of confusion to have him testify what he went over with Mr. MacCrate. What you did wht Mr. MacCrate a day or so ago is not an event happening at the time of the events

we are talking about so just drop that.

THE WITNESS: I don't have a specific recall of this document at the time that it was issued.

Q Was this document part of the documents which were located in your file, that is, the Ford file relative to Central and FLM?

A I don't know.

Q Where did the document come from, do you know that?

A I would assume it came from our auditing department.

Q Did you say prior to our luncheon recess, did you not say that the material which came from the auditors came across your desk?

A I said the summary comes across my desk. That is why I am having difficulty with that. That is not a format I am used to seeing. The summary format came across my desk. This is a foreign kind of document to me.

Q In November of 1969, were you at that time occupying the position that you presently have?

A Yes, I was.

Q So the reports of auditors would be coming to you, would they not?

A A summary, but not the detail disputing the summary.

THE COURT: We are belaboring this. What is the document number?

MR. JULIEN: The document is 17, your Honor.

I don't know whether your Honor has had his attention directed in Exhibit 96 or whether you read it in its entirety to that paragraph headed Historical Data.

THE COURT: I did read it.

MR. JULIEN: Exhibit No. 33, your Honor, which again is the auditor's worksheets for the '70 audit appearing on the last page is the following in the third paragraph:

"Each month Ford sends its statement to Central Lincoln Mercury dealer code No. 13-430 at the Yonkers address. FLM receives this statement, adds 3 per cent and sends its check to Central Lincoln Mercury code 110283 in Brooklyn.

"Central Lincoln Mercury in Brooklyn then remits its check to Ford for payment, one check for dealer code 13-430 and a separate check for its own statement, dealer code 11-283."

I was reading from Exhibit 33.

MR. MAC CRATE: Mr. Julien, what exhibit number is that?

MR. MAC CRATE: 33.

Q When FLM was makings it purchases through Central, this involved your company with no additional distributional expenses, correct?

A That is basically correct.

Q By the way, the volume of sales which were being performed under the code number which had been assigned to the FLM pickups, and that I think is -- withdrawn.

Were you familiar in a general way with the amount of volume of sales which was being performed by FLM under that separate code number assigned to it?

A At the time I was not much concerned with the numbers.

Q Not concerned. Did you know about them?

A I knew it was a large volume.

Q By large volume, could you give us the parameters, approximately?

A In excess of 20,000 a month, was my general understanding.

Q Does that volume exceed most of the wholesale business done by your franchise dealers in this area?

A I don't know.

Q What is your best recollection with respect to it?

A It would be pure conjecture. I don't look at markets that way. It would be pure conjecture. I don't think you want conjecture.

Q The figure you have given us of 20,000 a month volume for a franchise dealer, would that be a large volume?

A Yes, that would be a good wholesale volume.

Q Did there come a time when the credit rating specifically applicable to credit card 13 -- code card 13480 which was the code card for the pickups by FLM, where the company had under consideration increasing the credit limit for that specific card?

MR. MAC CRATE: Objection. I think there is a continued confusion talking about pickups and codes. Codes are not for pickups and by including that in the question, it does create a confusion.

THE COURT: I will overrule it. I think I get it. Was the company at one time considering increasing the credit limit applicable to code No.13430?

THE WITNESS: I don't know.

Q Have you seen that in any of the documentation you have gone over with Mr. Mac Crate?

THE COURT: Please, I don't want him testifying about what documentation he saw when going over documentation with Mr. Mac Crate. It really isn't relevant to me.

MR. JULIEN: Page 3 of Exhibit 18.

Q I will show you Exhibit 18 for identification. Can you tell us what that is?

A It appears to be auditor's worksheets.

Q Of the October 6, 1970 audit?

A I see a date on the bottom which says 10-6-70.

MR. JULIEN: I offer, if your Honor please, page 2 of Exhibit 18 in evidence.

MR. MAC CRATE: Objection, your Honor, to the offering of a portion of the document in evidence. I don't believe it has been adequately identified for the record.

THE COURT: Do you want to offer the whole thing?

MR. JULIEN: I have no objection to it.

THE COURT: You object to the whole thing?

MR. JULIEN: This was given to us as auditors worksheets.

MR. MAC CRATE: I have no objection to its

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introduction.

THE COURT: It is received.

(Plaintiff's Exhibit 18 was received in evidence.)

MR. JULIEN: I respectfully call your Honor's attention to the paragraph marked 3 appearing on the third page of this exhibit, which nevertheless is headed page 2 of 5. Paragraph 3 says:

"Current credit lines are as follows: No. 11283 credit code A, $35,000. No. 13430 credit code A, $10,000. Consideration is presently being given to increasing the limit for 13430 to $30,000."

There is one indecipherable word after a bracket "Phone to Tom Miles credit office manager Lavonia" -- the indecipherable word I think is per.

"Purchases year to date at August 31,1970 are, 11383;$55,662. Averages to $6,208 per month.

"No. 13430 total of 344,762. Averages $43,095 per month."

Q By the way, were there any audits performed on FLM books by Ford beyond 1970?

A No, I don't believe there were.

MR. JULIEN: That is all for the present.

MR. MAC CRATE: Mr. Julien, may I have the

documents I produced to you at the luncheon recess that you had requested this morning.

I note on one of these there is a plaintiff's sticker, Plaintiff's Exhibit for identification.

MR. JULIEN: I just had it put in.

CROSS EXAMINATION

BY MR. MAC CRATE:

Q Mr. Rowland, you will recall during your interrogation by Mr. Julien, you were asked whether you had seen references to what were described as dealer complaints and you were requested over the luncheon recess to review with me the documents that I have previously shown to you.

I hand you these six documents and ask you if those are the documents that we reviewed over the luncheon recess.

A Yes, those are the documents.

Q Are those the documents to which you had reference in your testimony this morning?

A Yes.

Q Do you know of any other documents that I have shown to you in the past that related to so-called dealer complaints that are not included in that group that I have shown to you?

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A No.

MR. MAC CRATE: I would offer these in evidence.

MR. JULIEN: No objection.

THE COURT: Received.

(Defendant's Exhibits AS1 through 6 were received in evidence.)

Q Mr. Rowlands, I show you a copy of Exhibit 85 for identification. Does it contain a statement of the policy relating to customers parts codes?

A Yes, and I see the specific reference on page 4 of 10.

MR. MAC CRATE: I offer it in evidence and I am happy to have it either as a defendant exhibit or as Plaintiff's 85.

MR. JULIEN: I have no objection to defendant's offer.

MR. MAC CRATE: Exhibit AT and I suggest that page 4 of 10 be marked AT-1.

(Defendant's Exhibit AT-1 was received in evidence.)

THE COURT: Are you introducing the whole document?

MR. MAC CRATE: Yes. The whole document is

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AT -- I would like the whole document marked AT.

xx3 (Defendant's Exhibit At was received in evidence.)

Q Mr. Rowland, I show you a copy of Plaintiff's 14 which has been marked in evidence and ask you whether the entire recommendation of the auditor as it appears in the last paragraph of that exhibit, Plaintiff's Exhibit 14, was implemented by Ford Marketing Corporation.

A Yes, it was.

THE COURT: Your question again?

MR. MAC CRATE: Whether that entire recommendation had been implemented?

THE COURT: Which entire recommendation -- I am sorry, I see it.

MR. MAC CRATE: There were two aspects to the recommendation, your Honor. One aspect relates to the dealer code, the other aspect relates to helping the dealer to continue to do busindss with the wholesaler.

Q Mr. Rowland, are you familiar with the organization --

THE COURT: Are you going to ask him how it was implemented?

Q Would you explain,Mr. Rowland, how it was implemented?

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MR. JULIEN: May we inquire first whether he has knowledge of his own, considering his previous answers?

THE COURT: This is awfully late. You asked him an awful lot. I will take anything he can tell us.

So the record is clear, the second recommendation of Mr. Sopper who was of the audit team department wrote: "Also, the dealer should be advised of alternate methods to properly and adequately supply his customer."

How was that implemented?

MR. JULIEN: Please allow me an objection to that question.

THE COURT: Overruled.

A Mr. Jim Rose advised the dealer of the second code number being cancelled, advised Central Lincoln Mercury about the second code number being cancelled and at the same time advised him on how he could conduct his wholesale business in a way it could conform to company policy so he would have no difficulty passing any audit. It had to do with direct billing to the retailer in setting up his books so that they would reflect direct billing to the retail customer it was wholesaling to.

THE COURT: Just go over that again, I didn't

understand it.

Rose advised Central of something?

THE WITNESS: Advised Central to make sure that their wholesale sales would be accepted as eligible sales by Ford Motor Company. He had recommendations as to how they should handle the sales on their sales records and their books and it had to do with Central billing directly to the retail customers that they were receiving the wholesale incentive.

THE COURT: I don't know what that has to do with anything. Technically, Mr. Julien is correct. It is strictly hearsay but I wanted to understand what you were getting at in your question so I am going to strike the whole line of testimony.

You don't really know of your own knowledge, it is strictly hearsay, of the implementation of that last sentence of the October 6th recommendation.

THE WITNESS: I know it from a written report.

THE COURT: I will strike the reference to the implementation and your answer that it was implemented until we get some admissible testimony on it that I can understand.

Go ahead.

Q Mr. Rowland, are you familiar with the organization of the Ford Marketing Corporation?

A Yes, sir.

Q And the charts of its organization as they are published in company manuals?

A Yes, sir.

Q I show you Defendant's F-1 for identification and ask you to please identify that for the record. It is the organization structure of the Ford Marketing Corporation.

MR. MAC CRATE: I offer it in evidence.

THE COURT: Any objection?

MR. JULIEN: May I have a preliminary question referrable to it.

THE COURT: Okay.

MR. JULIEN: Has this chart been prepared by you or under your supervision?

THE WITNESS: No, sir.

MR. JULIEN: Would your Honor permit me to defer my position? I don't think it is essential to have come in at this particular moment since it is not truly cross examination. Just let me give this some thought, please.

THE COURT: Let me see it.

THE COURT: Even though you didn't prepare it, you looked at it?

THE WITNESS: Yes.

THE COURT: It is received.

(Defendant's Exhibit F-1 was received in evidence.)

xx

Q I show you Defendant's Exhibit F-2 for identification and ask you to identify that.

A That is the organization chart of Ford Division.

Q Is that included in the company manual descriptive of the Ford Organization Division?

A Yes. This is Ford Division of Ford Marketing Corporation.

MR. MAC CRATE: I offer F-2 in evidence.

MR. JULIEN: Object to it as self-serving, if your Honor please. I may have no objection at a later point but at the present time I do object.

THE COURT: Overruled.

xx

(Defendant's Exhibit F-2 was received in evidence.)

THE COURT: What is it again?

THE WITNESS: The Ford Division of Ford Marketing Corporation.

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Q I show you Defendant's Exhibit F-3 for identification and ask you to identify it.

A This is the Lincoln Mercury Division of Ford Marketing Corporation.

Q Does that also come from the organizational manual?

A Yes, it does.

MR. MAC CRATE: I offer it in evidence.

MR. JULIEN: Same objection.

THE COURT: Received.

(Defendant's Exhibit F-3 was received in evidence.)

Q I show you Defendant's Exhibit F-4 for identification and ask you to identify it.

A Ford Parts Division of the Ford Marketing Corporation.

Q And it also comes from the same manual?

A Yes, sir.

MR. MAC CRATE: I ask it be marked in evidence.

MR. JULIEN: I had that as F-2.

THE COURT: This is the Ford Parts Division of FMC, is that right?

MR. MAC CRATE: Yes.

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THE COURT: Any objection to this?

MR. JULIEN: Same objection, if your Honor pleases.

THE COURT: Overruled.

xx (Defendant's Exhibit F-4 was received in evidence.)

Q I show you F-5 for identification and ask you to identify it.

A The dealer development organization structure.

Q That also comes from the organization manual?

A Yes.

MR. MAC CRATE: I offer F-5 in evidence.

MR. JULIEN: I can't see at the present moment what possible relevancy dealer development system of Ford can have to the issues of this case.

THE COURT: Can I see F-5, please.

(Pause.)

THE COURT: I don't see any relevance.

MR. MAC CRATE: Your Honor, the plaintiff has told us that they want to have present as a witness on Wednesday Mr. Costa, whose name appears on the center at the bottom under branch managers, New York. This is the section of Ford Marketing Corporation in which Mr. Costa can be found.

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THE COURT: So?

MR. MAC CRATE: There are two dealerships that are so-called DDs or dealer development units that are involved here.

You have Thomas and Parkview, Parkview formerly --

THE COURT: The only thing is, I know from your brief there may be a discussion about the relationship of Ford with those companies, ownership and so forth, but I don't see that it is going to really mean anything to have the organization chart.

I will sustain the objection. I would sustain an objection to relevancy as to most of those others but you didn't make it. I don't see that we need to have every last ounce, you know, all the organization and personnel, but they are in and I will leave them in, but I will exclude F-5.

MR. JULIEN: Would your Honor entertain a motion to strike these previous exhibits on the grounds of irrelevancy?

THE COURT: They are a little different than F-5.

BY MR. MAC CRATE.

Q There has been reference, Mr.Rowlands --

MR. JULIEN: Could your Honor excuse me for

just one moment?

THE COURT: Yes, of course.

(Pause.)

MR. MAC CRATE: During the recess, your Honor, the plaintiff's counsel have disclosed that it is their objective to complete their case tomorrow, which is a very significant change of plans from what we have previously be led to believe and under those circumstances, I have no further questions of Mr. Rowland at this time.

THE COURT: All right, fine.

MR. JULIEN: I have some questions of Mr. Rowland.

THE COURT: I can't recall any testimony. He identified some organization charts.

MR. JULIEN: Some dealer complaints, organization charts, instructions to Rose.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. JULIEN:

Q You told me that the last audit had been in 1970 of FLM. Was there an audit of Central in 1972 as a result of whcih you had further discussions within your company concerning FLM?

A There was an audit of at last who was the

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predecessor dealer -- Central was the predecessor dealer; but my understanding of that audit was, there was no auditing activity at FLM.

THE COURT: When was that, in 1972?

MR. JULIEN: 1972.

Q For the record, how did Atlas succeed to Central? Was that a takeover, a sale or which?

A I don't know the details, but they bought out the assets of Central. I don't know the details, whether they bought the corporation or the assets, but it was a normal buy and sell agreement.

Q Again, was Atlans one of the dealer development corporations?

A I don't believe so. I don't know specifically.

Q Following that audit in 1972, did you learn that up to the time of that audit, even without the separate code number, that FLM was still buying wholesale through the successor corporation --

THE COURT: That is stipulated. What is the point of this?

MR. JULIEN: This is preliminary to my next question.

THE COURT: Go to the next question.

Q Did you get some complaint from a party by the

name of Lamar Hughes?

A Lamar Hughes called me about a problem at Atlas.

Q Did you then issue instructions that Atlas would thereafter receive no wholesale incentive allowance for sales made to FLM?

A That was the final result, for Atlas to be informed.

Q Did you do that?

A You will have to restate the question.

Q Did you order Atlas to be informed that there could be no further sales to FLM for which it would receive any kind of wholesale incentive?

THE COURT: WE assume Atlas was so informed because it was cutoff. Is there some particular thing you want to find out except for the bare fact of the cutoff? If you want to then inquire about the reason, something like that, but I know there was a cutoff and I assume Atlas was notified. All of this is stipulated.

MR. JULIEN: And that there were no further sales from Atlas to the plaintiff.

THE COURT: That is a different matter. You are talking about the incentive discount.

Q From the time of that cutoff , there were no

further sales by Atlas to the plaintiff in this case, isn't that so?

A My only action was --

Q Not your action. Do you know?

A I don't know.

Q You have never inquired into that?

THE COURT: He says he doesn't know.

A My action was to inform the dealer nomore wholesale incentive.

Q I am asking you whether you have ever inquired after issuing this cutoff information, did you ever inquire of Atlas or your distributing manager in charge of Atlas whether there were any further sales made to FLM?

A I have no recall on that. I don't believe I did.

Q This writing from yourself to Mr. Rose, or Mr.Rose's report to yourself relative to FLM, do you have that in your possession?

A Which report are you speaking of?

Q Concerning the cutting off of the code number for FLM.

A You are back now to 1970?

Q Yes.

THE COURT: What does this have to do with

Mr. Mac Crate's cross? You are redirecting. Are you just thinking up things that you didn't think of on your direct?

MR.JULIEN: No, I am not.

THE COURT: I can't recall anything in Mr. Mac Crate's cross that gives rise to this kind of a question.

MR. JULIEN: If I may refresh the Court, it made reference to instructions from this gentlemen to Rose to cancel the code credit card of FLM and it is to that, that thing to which I appended the examination I am presently making.

THE COURT: You have reference to the policy. What is the writing you are asking about?

Q I am asking about the policy between yourself and Rose either way on the subject of this cancellation of the code number.

THE COURT: What is the question.

Q Were there writings between yourself and Mr. Rose on the subject of cancelling this additional code number for FLM's material?

A From May'70 through December '70. Can you be more specific? I don't recall specifically about writing Mr. Rose. It was May '70 when he brought the problem out on the code numbers. I recall taking action after

getting the November '70 audit. The way that was communicated --

Q Sir, that is not my question.

A What is your question?

Q My question is, was there a writing between yourself and Mr. Rose on the question of FLM's code card?

A I don't recall any.

Q You learned about it from Rose in May of '70 and your first order had a cancellation after the audit in November of 1970?

A That is right.

MR.JULIEN: That is all.

THE COURT: All right. You may step down.

(Witness excused.)

MR.JULIEN: Your Honor, I had been able to eliminate some of the deposition material which I intended to bring to your Honor's attention.

THE COURT: Do you have another witness here you can start?

MR. JULIEN: Yes.

THE COURT: Let us start the witness. You can use the deposition later. Just mark it and bring it to my attention, I will read it later. Let us start a witness.

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MR. JULIEN: Mr. McKee.

S T E P H E N M c K E E , called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JULIEN:

Q Do you hold a position in FLM Collision Parts?

A Secretary-treasurer, chairman of the board of directors.

Q The stipulation tells us your concern was incorporated in April of 1965. Who were the principals in that corporation?

A Myself and John Andidero, president of FLM Collision Parts.

Q Had you gentlemen or either of you, had any prior experience in the field of Ford crash parts?

A Yes.

Q Would you state briefly to his Honor what the nature of that experience and over how long a period it had taken?

A I had been employed in various Ford dealers since 1945 in capacities such as assistant to the parts manager, parts manager and similar. My partner had the same experience, but not for the same length of time.

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Q When you originally set up this corporation in '65, what was its business devoted to?

A Strictly the supply of collision parts.

Q Any particular kind?

A Ford, Lincoln and Mercury.

Q How large a percentage of your total business was devoted to this business of collision parts of Ford, Lincoln and Mercury?

MR. MAC CRATE: Objection. A statement of percentage of business in this way is going to give us some very loose data with which to work.

THE COURT: Overruled.

THE WITNESS: Could I have the question again, please?

Q What percentage of your business at its inception was devoted to the handling of collision parts of the Ford, Mercury and Lincoln,

A At inception, 100 per cent.

Q Was that on a retail or wholesale basis?

A Wholesale basis.

Q What were the nature of your customers?

A Body shops. We have supplied Ford dealers and a few service stations, but basically body shops and body repair shops.

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Q Would that be independent body shops and body repair shops or body shops in the Ford franchise complex?

A Independent body shops.

Q In the early years from '65 on to '66 and '67, from what source did you obtain your merchandise?

A From Central Lincoln Mercury in Brooklyn.

Q This was a Ford franchise dealer?

A It was a Ford franchise dealer.

Q Would you give his Honor some idea on --

MR.JULIEN: We will have the exact figures on this.

Q Would you give his Honor some idea of the volume of sales you were doing the first year of your operation, the second year, and what increase,if any, was manifested in your sales?

THE COURT: Don't we have that stipulated in paragraph 30? We have a stipulation as to FLM sales as to the Ford, Lincoln and Mercury crash parts.

MR.JULIEN: You are quite right. I will withdraw that question.

Q Did there come a time when a code card was obtained by your concern from Ford?

A Yes.

Q Did you or any member of your firm meet

with any of the Ford people at that time?

A At that time, no.

Q Prior to that time?

A No.

Q I mean on the subject of a code card.

A No.

Q First tell us in a general way and not restricting yourself to a code card for the moment, when you were doing your purchasing through Central, how did you obtain your merchandise physically?

A Each order was called directly to Ford Motor Company order desk and specifically picked up by FLM's drivers and/or trucks.

Q From Teterboro?

A From Teterboro.

Q By the way, were you and your associate personally known to the postmaster at Teterboro?

A Yes.

Q How had that come about?

A I had been parts manager of a dealership from 1960 until 1965 so I was personally known to I would say 100 per cent of the order takers in Ford Motor Company.

Q And did they know you were in business for yourself?

A Yes.

Q The code card separately numbered was issued to you in 1968, am I correct?

A Correct.

Q Do you happen to recall the month, just for reference purposes?

A I don't recall the month.

Q Before the receipt of the code card separately for your concern, how had you obtained the merchandise when you arrived at Teterboro, merchandise which you had purchased through Central on its first code card?

MR. MAC CRATE: Would you read that question?

(Question read.)

MR. JULIEN: I will revamp it.

Q Before receiving your own code card from '65 to '67 inclusive, what were the circumstances surrounding the manner in which you secured the merchandise at Teterboro?

A Central Lincoln Mercury had authorized Ford Motor Company to accept all orders placed by FLM on its dealer code 11283. We in turn would pick up such orders at Teterboro.

Q Did there have to be that kind of authorization from the franchise dealer to enable you to get

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the merchandise directly at Teterboro?

A Yes.

Q And that was done?

A That was done with the request for a card to allow us to pick up which is checked by the security guard on entering and leaving Teterboro warehouse.

Q Even before the card had been allocated to you, were you checked with respect to the authorizations given to Ford to enable you to make these pickups at Teterboro? This is before you got the card. Were you checked by security at that plant?

A Before we got our own card?

Q Yes.

A Yes, we were checked but at that time we were picking on the 11283 card with the authorization of Central Lincoln Mercury.

Q Were your trucks marked in some fashion to show the name of your concern?

A No, our trucks are not marked.

Q After receiving your own card, how were the transactions of the pickup of merchandise thereafter handled?

A On exactly the same basis except now it is not necessary to segregate the order. Previously orders

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had to be segregated marked FLM pickup.

Q By whom had they previously been marked FLM pickup?

A By the accounting department at Ford Motor Company.

Q With the new number, would you give us an idea of how physically the code card is employed? Your truck goes to the concern and what follows after that?

A To give a perfect example would be to start fromthe placing of an order. An order is called directly to the order desk identified as a dealer code, not necessarily as the name of the dealer but as a dealer code and at that particular period, you were asked what particular time of day you want a pickup. We no longerhave the same system.

I would ordinarily pick up the phone in the morning, read off a list of part numbers, pick-up time 2 p.m. My truck would enter the depot 2 p.m. and the order would be ready.

Q Under your number?

A Yes.

Q The order people you spoke to on the phone, were you known to them personally and were they known to you?

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A Yes, to both questions.

Q And did they know you were in business for yourself?

A Yes.

Q Would you tell his Honor before a time when you were cutoff from any wholesale incentive allowance, what were the arrangements under which you obtained the goods which you sold at wholesale, the Ford crash parts?

A The actual physical arrangement?

Q Yes. You have your card?

A Right.

Q What were the arrangements? What did you get? What kind of discounts did you get on the merchandise?

A At that time we werepaying exactly 3 per cent over Ford cost which is, at that time, list less 42 percent, which has been slightly restructured to list less 40 per cent.

Q I understand that, but I want you to come down to, are you aware of the time when the wholesalers incentive plan was inaugurated, started?

A 1968.

Q Do you have a month for that?

A Not in my mind at this moment.

Q Now, at that time what was the wholesale incentive discount which was being allowed you?

A 100 per cent of the incentive allowed by Ford Motor Company.

Q And what was the incentive allowed at that time for wholesalers?

A Basically 20 per cent of dealer cost.

Q I understand that this did not apply uniformly to all of the crash parts, am I correct?

A Correct.

Q Were you able to average out the discount which you were receiving for wholesalers incentive over all crash parts?

A Yes.

Q What percentage did you arrive at?

A 16 per cent.

THE COURT: The average was not 25 per cent. The average was 16 per cent.

THE WITNESS: Of our total pruchase.

If Imay clarify a little. 25 per cent is based only on eligible items.

Q By lum;ing the eligible and non-eligible items together on an overall basis,it amounts to 16 per cent?

A Yes.

THE COURT: In other words, there are some you don't get any discount on?

THE WITNESS: Correct.

Q We may have it but I want to be certain.

From the time of the creation of that wholesale incentive, was it passed on to youin its entirety by Central?

A Yes.

Q How much was central receiving above its cost from you?

A 3 per cent.

Q Now, what was the margin of profit upon which your organization was running during the years '68 and '69 and '70 after receipt of this wholesale incentive?

MR. MAC CRATE: Objection, your Honor, as to the margin of profit on which an entire business is run.

THE COURT: I will allow that. We have to get more details, obviously.

MR. JULIEN: We will have exact figures.

A The margin of profit at that time was 33 per cent.

THE COURT: Obviously I don't know what that is. Is that margin of profit after overhead or anything?

416a

It doesn't mean a lot.

Q Would you explain what you wmean by 33 per cent margin profit?

A That was of gross sales.

THE COURT: Before overhead?

THE WITNESS: Before overhead.

Q At that time --

MR. MAC CRATE: Excuse me. '65 to '68?

MR. JULIEN: '68, '69 and '70.

Q At that time, '68, '69 and '70. How much of your total volume business at that time was allocated to the handling of crash parts in the Ford, Mercury and Lincoln group?

A I would say 98 per cent.

THE COURT: I will adjourn now and we will reconvene at 10 o'clock tomorrow.

(Adjourned to September 24, 1974, at 10:00 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Morris J. Rowland	10	93	103	
Stephen McKee	109			

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FLM Collision Parts, Inc.
vs. 73 Civ 713
Ford Motor Company and Ford Marketing Corporation

September 24, 1974
10:00 o'clock a.m.

(Trial resumed.)

S T E P H E N M C K E E , called as a witness, having previously been sworn, testified as follows:

THE COURT: You may continue.

DIRECT EXAMINATION CONTINUED

BY MR. JULIEN:

Q Mr. McKee, during the period you were operating both under the code number separately assigned to you and even after it was revoked, what was the nature of your operation insofar as your customers were concerned? What service, if any, did you render to them?

MR. MAC CRATE: Objection.

THE COURT: What is the ground of the objection?

MR. MAC CRATE: The objection is no code number was assigned to Mr. McKee.

THE COURT: I think I understand the evidence. We will take that question as a kind of shorthand. Objection overruled.

A Repeat the question.

Q What service were you rendering your customers?

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A When they placed the order, I would supply the parts as placed. If the body shop could not determine what was necessary to repair the car, I personally would go visit the shop and write up the order as required so that a customer could be assured of having the correct parts on every job.

Q Do I understand from that you were rendering some counseling or advice to your customers with respect to their needs?

A Yes.

Q Tell me, from your experience in this field, is that a service which is rendered by the franchise dealers to their customers?

MR. MAC CRATE: Objection.

THE COURT: Overruled.

A No, my experience is, it is not.

Q Would you explain to his Honor the method of delivery which was employed by your concern to your customers' body shops and service stations and so forth?

A All right. An order placed in the morning would be delivered that afternoon if all the parts were available from stock. If not, parts not available from our own inventory, the order was placed on Ford Motor Company and delivered the following morning.

Q Did you provide the delivery?

A Yes, we provided it.

Q By your own trucks?

A By our own trucks.

Q Would you tell his Honor whether that service of delivery from your experience in this field was rendered to customers, wholesale customers of franchise dealers?

MR. MAC CRATE: Same objection.

THE COURT: Overruled.

A That service was rendered by a few, but not by 100 percent of all Ford and Lincoln-Mercury dealers.

Q Let me put it in this way. In this particular area could you tell us, in the New York area and its environs, has that service been uniform with dealers or the majority or a few? What was the situation there?

MR. MAC CRATE: Same objection.

THE COURT: I think it is now kind of confusing. I don't really understand how anybody can answer it.

When you are talking about "this service", you mean the delivery?

MR. JULIEN: Yes.

THE COURT: The delivery alone or the timing of the delivery?

MR. JULIEN: I will take it separately.

Q What about the delivery?

A You mean delivery by other Ford dealers in our area?

Q Yes.

A The service is performed by a few but not by 100 percent.

THE COURT: There is a lot of difference between a few and something less than 100 percent. Something less than 100 percent can be 99 percent.

Is it a few like 10 percent or is it 90 percent?

THE WITNESS: I would say less than 10 percent, your Honor.

THE COURT: In other words, to your knowledge, less than 10 percent of the Ford Lincoln-Mercury dealers in the New York area actually deliver crash parts; is that right?

THE WITNESS: Right.

THE COURT: What do the body shops have to do, do they have to go pick them up at Teterboro?

THE WITNESS: They pick them up at the dealerships.

Q With respect to the rapidity of delivery, the speed of delivery, what can you tell his Honor about how your procedure compared with that employed by those 10 percent approximately dealers who made deliveries?

A My experience was that we had a much faster delivery on the fact we could deliver from our own inventory basically

on the same day as ordered.

Q Was this a valid selling point with respect to soliciting trade from your customers?

A Yes.

Q Was counseling and advice concerning what they need, was that a valuable service?

A Yes, it was.

Q Following the two audits made of your accounts by the auditors of Ford, was there any claim or suggestion by anyone in the Ford complex that you were somebody who was transmitting parts from one dealer to another?

A No.

MR. MAC CRATE: Objection.

THE COURT: Overruled.

A No.

Q Did you have any --

THE COURT: You mean by that, from one Ford Lincoln-Mercury dealer to another Ford Lincoln-Mercury dealer?

MR. JULIEN: Yes, indeed.

THE WITNESS: That is how I understood the question.

Q As a matter of fact, did you do that? Were you a conduit in which parts passed from one dealer, Ford Mercury-Lincoln, to another?

MR. MAC CRATE: Objection. It calls for a conclusion.

THE COURT: Overruled.

A In minor instances we did sell items to another Ford dealer.

Q What would be the circumstances?

A A back order at Teterboro, in which the dealer needed the part to complete the job.

THE COURT: Let me hear the answer again.

(Answer read.)

THE COURT: What do you mean "a back order?"

THE WITNESS: There are many items that Teterboro is out of stock. In such cases, in an emergency, we ourselves actually do the same thing. We will call other dealers. Other dealers call us under the same circumstances.

Q That is just an emergency fill-in, is it?

A An emergency fill-in.

Q Were any dealers regular customers of yours?

A No.

Q Was this one of the things that the auditors attempted to find out about when they were looking at your books?

A That is one of the things covered in the audit.

Q Did any other dealer, any franchise dealer, have any interest in your concern?

A No.

Q Did you have any interest in any other franchise dealer's concern?

A No.

Q A name has appeared in one of these documents, Collura.

MR. JULIEN: That appears in Exhibit 10.

Q Who was Joe Collura?

A He was the gentleman who introduced me to the dealer principal of Central Lincoln-Mercury.

Q Was that in 1965?

A It would be 1965 or previous. I would expect it was early '65.

Q Was Joe Collura somebody who was connected with the Ford Motor Company?

A At that time I believe his position would be service representative of the Lincoln-Mercury Division.

Q For any particular area?

A I would not be aware of the area.

Q This Mr. Collura, after you started making your purchases through Central Lincoln, did Mr. Collura have anything to do with the follow-up with respect to your customers and Central's customers in allocating the sales?

MR. MAC CRATE: Objection. I don't understand the question.

THE COURT: Sustained. I do not understand it.

Q Did Mr. Collura do anything after introducing you two together? Did he do anything further with respect to the conduct of your business with Central?

A Yes. He didassistin segregating Ford invoices, what would apply to FLM and what would apply to Central proper.

Q Was that before you received your own separate code number?

A Yes.

Q How often would this representative of Ford be segregating these invoices which would show which were bought by you and which were bought by Central?

A On a monthly basis.

THE COURT: Who did the segregating?

THE WITNESS: Mr. Collura with the help of Central Lincoln-Mercury employees.

Q Was that for the purpose of ascertaining who was responsible for which of the invoices?

A That is correct.

Q Did Collura do anything else as time passed on with respect to your transactions through Central?

A For that question, I would say, no.

Q Did any other representative of the Ford Motor Company on any occasion come to visit your premises up in

Yonkers?

A Yes.

Q By the way, were your premises marked or identified in any way to indicate the name of your company?

A Yes.

Q How?

A By the name FLM Collision Parts, prominently displayed on the window at that time. We are speaking of the period '65 through '71 until we moved the premises.

THE COURT: Where were your premises in 1965 to 1971?

THE WITNESS: 416 Sawmill River Road as compared to the present address of 356 Sawmill River Road.

Q Both locations in Yonkers?

A Yes.

Q Who was it that called to see you at your premises there?

A I had a visit from the representative, Mr. Hunter.

Q Do you know who he was and what his position was with Ford?

A I believe at that time -- I don't know what his actual title would be. It would be parts sales manager, district sales manager. Something along those terms. I wouldn't know exactly.

Q Apart from Mr. Hunter --

THE COURT: When did he come?

THE WITNESS: Mr. Hunter would have visited my place in 1968 or '69.

Q What was the purpose of his visit, what transpired?

A Actually he looked at the overall picture of the operation of FLM Collision Parts, checked such things as the customers we were selling to, the discounts we were giving; that the proper procedures were used as to correct part numbers and the such. He also checked the layout of the premises and similar items.

Q Was there an occasion where a party named Sullivan came to your premises?

A Yes, we had a visit from Mr. Sullivan and also had phone calls from Mr. Sullivan.

Q What was Mr. Sullivan's position?

A He is a part representative, I believe, for the Brooklyn area.

Q What was happening both with respect to his visit and his telephone calls to you, what were they about?

MR. MAC CRATE: I object, your Honor.

THE COURT: Overruled.

A Mr. Sullivan was soliciting orders on behalf of Ford Motor Company.

Q During what period did that transpire?

A To be exact, I would have to say '66, '67, somewhere in that particular area and to tie it down to actual year, possibly all the way through to '68.

Q I am not just talking about the visit, I am talking about telephone calls too.

A While he was the representative for the Brooklyn area, there was some discrepancy as to whether credit should be applied to sales solicited by a salesman out of the district. In other words, our location was in Westchester County as compared to the location of the representative. In such cases, most business would be done by telephone. In other words, business would be solicited by telephone.

Q You are talking about business solicited of you?

A Of FLM Collision Parts.

Q By Sullivan?

A By Sullivan.

Q Did he receive orders from you?

A Yes, he did.

Q Were such orders delivered or picked up by your concern?

A I think yes to both questions, delivered and also picked up.

Q Would you please clarify, you told us yesterday that

the practice was to pick up these orders at Teterboro. Under what circumstances would they actually be delivered to you?

A If we found we had too bulky an item to actually physically fit inside a vehicle or the order would be too bulky for the day, we would ask it to be shipped direct to the FLM premises in Yonkers.

Q Who would you ask?

A With whoever the order was placed.

Q On occasions when it came through Sullivan, who would you ask?

A I would ask Mr. Sullivan.

Q Was that done?

A Yes.

Q In one of these exhibits, Exhibit 96 which is a summary of the '69 audit, there is reference to a conference, a closing conference held with dealership personnel.

Do you recall such a conference on or about October 22 of 1969?

A Yes.

Q Listed under dealership personnel appear the names of Mr. Gordon, Mr. Kramer and Mr. McKee. Who were Gordon and Kramer?

A Mr. Gordon was the dealer principal. Mr. Kramer ...uld be the general manager of Central Lincoln-Mercury.

THE COURT: Who was Gordon?

THE WITNESS: Dealer principal.

THE COURT: What was that?

THE WITNESS: I assume it to be chairman of the board.

THE COURT: So Fordon and Kramer are both with Central Lincoln-Mercury?

THE WITNESS: Yes.

Q In that listing they have you down as Mr. S. McKee, owner, FLM Collision Parts, Inc. under the dealership personnel.

What was that meeting about, to your recollection?

A As I recall it, we did go over the audit which had just taken place and the reasons for any charge backs which may have taken place at that time.

Q This refers to thepresenceof a Mr. DeAngelo, assistant district manager of Autolite Ford Parts Division, and Mr. Ermilio, assistant district manager of service for the Lincoln-Mercury district personnel as well as Mr. Gilpin, the auditor.

Do you recall anyone else who was present at that meeting?

A No. I recall Mr. DeAngelo and Mr. Gilpin, but the name Ermilio, escapes me.

Q In this audit which had been ongoing prior to this

closing conference, had your customers, your ledger showing your customers been examined?

A Yes.

Q And your books and records showing the passing on to you of the incentive, wholesale incentive, had that been shown?

A Yes.

Q And that was shown right in your books?

A It was shown.

Q In the 1970 audit, likewise, did they audit your books of accounts showing your customers and the passing on to you by Central of the wholesale incentive?

A Yes.

Q I want to show you 103 for identification and ask you to tell his Honor what that document is.

MR. MAC CRATE: May I see it before the witness examines it, please.

MR. JULIEN: Yes.

MR. MAC CRATE: We have never been shown a copy of that before by plaintiff's counsel, so I am seeing it for the first time.

MR. JULIEN: This was an added starter. We had it marked.

THE COURT: What do you want to do with it?

MR. JULIEN: After it is identified, I intend to offer it.

THE COURT: All right.

Q Tell us what it is, please.

A This is a credit slip issued by Ford Motor Company on behalf of a shortage claimed by FLM Collision Parts or on goods not delivered to FLM Collision Parts. The credit is issued by Ford Motor Company and in this instance, made out directly to FLM Collision Parts.

MR. JULIEN: I offer it.

THE COURT: What is the date?

MR. JULIEN: January 19 -- no, February 19, 1973.

MR. MAC CRATE: Objection, unless the original is produced and permits our examination. There is handwriting on this document and the whole document raises serious questions of authentication.

MR. JULIEN: If your Honor pleases, we have accepted -- let me just see it. We have yet to see an original document.

MR. MAC CRATE: Originals have been available for inspection.

THE COURT: By this time, had you stopped buying Ford collision parts?

THE WITNESS: No, your Honor.

THE COURT: You are still buying them?

THE WITNESS: Yes.

THE COURT: Where do you get them from?

THE WITNESS: Pleasantville Ford in Pleasantville, New York.

THE COURT: I will receive this.

xx (Plaintiff's Exhibit 103 received in evidence.)

Q In addition to Mr. Hunter and Mr. Sullivan, did you ever receive any communication from or visits from a party named Rose?

A No.

Q Did you have any communications with him?

A I have had telephone communications with Mr. Rose.

Q Did you have some communication with him with respect to the cancellation of your code card?

A Yes, I had.

THE COURT: Who is Mr. Rose?

Q Identify Mr. Rose.

A Mr. Rose would be -- I don't really know his correct title.

THE COURT: Is he with Ford?

THE WITNESS: Yes.

MR. JULIEN: He is presently district sales manager, Ford Parts Division. I just want to be sure this was his

occupation at that time.

Yes, he was then in the New York district as district sales manager, Ford Parts Division.

Q Would you tell his Honor what the substance of the conversation was with Mr. Rose concerning the code card?

A You mean after the code had been withdrawn?

Q Is that when the conversation took place?

A Yes.

Q Go ahead.

A I asked why it was withdrawn and I was told all dealers with more than one card were being restricted to the use of one dealer card.

MR. MAC CRATE: Excuse me. Was the answer card or code?

THE WITNESS: I said card, but I did mean to imply code. I better restate the answer.

I did mean code when I said card.

Q Originally when you first entered into this business, did you speak to anybody about getting parts at wholesale directly from Ford?

A Yes, I did.

Q With whom was that?

A Maccia.

Q Was he someone connected with Ford at that time?

A At that time he would be a parts representative or district parts representative.

Q Could you give us an idea of approximately when that occurred?

A Early '65.

Q What was the nature of that conversation?

A The nature of that conversation was that in his estimation, it would never be possible for me to buy direct from Ford Motor Company or sell parts other than as a representative or as a parts manager of a Ford dealer.

Q As your sales increased in accordance with what is shown in the stipulation, would you tell his Honor what was the amount of personnel in your business when you first started and as the sales increased, how did the personnel increase and if you can, include in that the facilities as well.

A 1965, at this point, and I am including export officers, there were two of us. In 1966, 1967, three. In 1968 --

Q Three what?

A Personnel including export officers.

1968, '69, four. I am going from memory now. By 1970, I was up to six. 1971 to seven and presently, eight.

Q There are just two export officers?

A Yes.

Q The others are employees?

A Yes.

Q About your premises?

A The premises originally we started out with approximately 2500 square feet. We took on an additional 500 square feet and we rented another approximately 1700 square feet and give or take another couple of two-car garages that we used on occasion for another 500 square feet.

Presently we have 6500 square feet.

Q Did there come sometime when your company was interested in securing even larger quarters or newer quarters?

A Yes.

Q What year was that, approximately?

A Approximately '68, '67, somewhere in that.

Q Were these premises shown to anyone connected with the Ford organization?

A Yes.

Q When and how did that come about?

A I had a visit from a Ford representative whose name I do not remember, and I showed him premises on Lockwood Avenue in Yonkers which I anticipated purchasing but did not consummate any deal at that time.

MR. MAC CRATE: May I move to strike the testimony, your Honor, identifying as a Ford representative without any

indication of who the individual is.

MR. JULIEN: May I ask a preliminary question. Perhaps I can straighten it out.

Q Had you seen that gentleman before?

A No.

THE COURT: I will strike it. Really it does not mean much.

Q Was there any occasion where you were contemplating a change or an enlargement where the premises were either shown to Ford or your plans changed because of something from Ford?

A Yes.

Q That is the incident I am interested in. Would you tell us about that.

A I had occasion to actually purchase and place a deposit on a building in Mount Vernon.

Q When was that, please?

A Again I would say in the period '68 through '70. I cannot be exact as to the date but I am sure we could have it checked to show I made a deposit on a building.

After I made this deposit, I saw down with my partner, my counsel and decided, what have we not done. I realized I had not asked permission from Ford Motor Company to move the address of a dealer code.

It has always been my understanding to move the address of a dealer card, you must have Ford Motor Company's permission, so in that respect I called Ford Motor Company.

Q Whom did you speak to?

A I spoke to Mr. DeAngelo.

Q I don't remember whether we have had a description of his position or not, but I think it is shown in one of the exhibits.

We have it as assistant district manager, Autolite Ford Products, Exhibit 96.

A Mr. DeAngelo informed me that Ford Motor Company would not take kindly to such a move and at this moment to do nothing, and we did not consummate the deal on his advice.

Q Is Exhibit 104 for identification the deposit which you had put down on that occasion for the premises in which you were interested?

A That is it.

MR. JULIEN: I offer it.

MR. MAC CRATE: No objection.

xx (Plaintiff's Exhibit 104 received in evidence.)

Q Preliminary to the next series of questions I wish to ask you, I would like to know how physically your stock orders were presented to Ford Motor Company.

Is there a form of some kind which was employed?

A Yes, there is a weekly stock order pad.

Q When we talk about stock order, are we talking about a special brand of merchandise to which there is some additional wholesale benefit?

A No. It applies to all the Ford items, not any particular brand or classification of item.

Q What I am trying to ascertain is, these stock orders, is that the ones that received the three percent allowance from Ford?

A The allowance would be a five percent allowance stock order discount.

Q Is that what you are now describing?

A Yes.

Q Please explain. The five percent discount allowance is on what kind of goods ordered in what fashion?

A That is on one order placed per week on the stock order pad, not phoned in, written in but placed on the stock order pad and the stock order pad transmitted to Ford Motor Company.

Q Who provided those pads?

A Ford Motor Company.

Q Did they provide them for you?

A Under the 13430 dealer code, yes.

Q While you were operating under that code, were you

receiving this five percent stock order allowance?

A Yes.

Q When did that terminate?

A With the removal of the separate code number.

MR. JULIEN: We have the figures on what that amounted to by year, your Honor, which we will supply later.

Q On the obsolescence allowance. What is the percentage and how does that work?

A Obsolescence allowance is approximately five percent -- I shouldn't say approximately, is five percent of all parts purchased from Ford Motor Company or its divisions.

Q Did that require the return of some merchandise to get the five percent?

A That requires the physical return of the merchandise.

Q Decided by the customer as to whether it is obsolete or not?

A Basically, yes, but there are certain items with an asterisk on the returns pad which states that it will be the last time such an item can be returned. It notes that the part will be obsolete as of that period.

Q Who is it that provides that asterisk or explanation?

A Ford Motor Company.

Q Is this on forms provided by them, too?

A Yes.

Q During the period you operated under your separate code number, did you have such forms provided for you?

A Yes.

Q Were you receiving this five percent obsolescence?

A Yes.

Q Following the termination of your code number, did you continue to receive the obsolescence?

A No.

Q When you were doing business --

MR. JULIEN: Your Honor, I don't mean to repeat, but I am not sure whether this one point has been made yet.

Q When you were doing business with Central from the creation of the incentives which, I think, was in what year?

A '68.

Q What was the override that you were paying to Central for your merchandise? What were the terms of sale between you and Central?

A Three percent over dealer cost.

THE COURT: What is meant by "dealer cost?"

THE WITNESS: Dealer cost at that particular time --

THE COURT: What particular time?

THE WITNESS: '65 through '68, would be Ford's suggested list price less 42 percent.

Q That would be suggested retail?

A Suggested retail list price.

Q Besides the 42 percent, when you were receiving the wholesale allowance and the obsolescence allowance and the stock order allowance, that was in addition, was it?

A We were receiving the wholesale allowance -- in what period are we?

THE COURT: I thought you asked him or he said 1965 through '68. I gather you are talking about the time before the wholesale allowance.

MR. JULIEN: The wholesale allowance wasn't in effect at that time.

THE COURT: That is what I said. It was before.

MR. JULIEN: That is right.

THE COURT: Why don't you describe before the effectiveness of the wholesale allowance, you were paying three percent over dealer cost, right?

THE WITNESS: Before the wholesale incentive, we were paying two percent over dealer cost.

Q When did that change?

A That changed, as far as my recollection, in 1968 when the wholesale incentive became available.

THE COURT: Two percent over dealer cost, right?

THE WITNESS: Yes.

THE COURT: Dealer cost was Ford's suggested retail

less 42 percent?

THE WITNESS: Right.

THE COURT: Did Ford have in effect at that time, that is, before the wholesale allowance, these other discounts such as the stock order discount, the obsolescence allowance?

THE WITNESS: Yes.

THE COURT: Did that serve to reduce the dealer cost or how was that figured?

THE WITNESS: The stock order discount reduces the dealer cost. The obsolescence plan physically reduces the dealer inventory.

THE COURT: So it does not really reduce dealer cost. It means you get some money back for parts you have taken back?

THE WITNESS: It would be an extra profit on the fact that if he no longer has to retain money tied up in inventory.

MR. JULIEN: A benefit.

THE COURT: The obsolescence allowance does not reduce the cost of parts sold because the parts are not sold?

THE WITNESS: It does not reduce the cost of the parts.

Q It is just an added business benefit?

A Yes.

THE COURT: How about that extra added inventory reduction credit?

THE WITNESS: I do not use it because of the cost which prohibits the use of it.

Q So that is not a factor with you?

A No, definitely not a factor.

Q In '68 when the wholesale incentive was created, did you tell us that the percentage you were giving to Central increased from two to three percent?

A Correct.

Q Over dealer cost?

A Over dealer cost.

Q Then the incentive allowance and the stock order allowance were yours?

A Yes.

Q Above that?

A Yes.

Q And you also had the benefit of the surplus inventory plan too?

A The obsolescence program, not surplus inventory.

THE COURT: Let me get this. In 1968 this wholesale allowance was put into effect?

THE WITNESS: Correct.

THE COURT: So you were paying -- and you started

paying three percent over dealer cost?

THE WITNESS: Yes.

THE COURT: And the three percent was figured on dealer cost?

THE WITNESS: On dealer cost.

THE COURT: How was dealer cost figured after the wholesale allowance was put into effect?

THE WITNESS: Dealer cost at that time would be Ford's suggested retail price less 40 percent.

THE COURT: Less 40 percent?

THE WITNESS: Yes.

THE COURT: How does the wholesale allowance get cranked in?

THE WITNESS: That is on eligible items, 25 percent off dealer cost off eligible items. All items are not eligible for wholesale incentive.

THE COURT: Does that serve to reduce the dealer cost on which your three percent is figured?

THE WITNESS: No. We paid on the actual dealer cost, not on dealer cost less the wholesale incentive.

THE COURT: Let's use some illustration. Suppose Ford's suggested retail price is ten dollars for a particular part. You would start with the ten dollars and take four dollars off?

THE WITNESS: Right.

THE COURT: That would be the dealer cost?

THE WITNESS: Yes.

THE COURT: And you would add three percent of that?

THE WITNESS: And that would be our actual purchasing price.

THE COURT: In addition to that 40 percent off --

MR. JULIEN: I think I know the point your Honor is trying to get.

THE COURT: I do not see how he cranked in the wholesale allowance.

Q In addition to the 43 percent that you pay --

THE COURT: What do you mean 43 percent?

MR. JULIEN: 57 percent.

Q -- of the retail price which you were paying at that time -- start this way:

You may 40 percent of suggested retail price plus another three percent?

A Correct.

Q That is your initial cost?

A Yes.

Q Then you receive in addition to that, do you not, the wholesale incentive?

A Correct.

Q And the wholesale incentive on crash parts averages out to 16 percent on all parts?

A Actual average taken over three years use worked out to be 16 percent off our total purchases.

THE COURT: Let me get that. I still do not see -- let's go back to our ten dollar item. I want to know how much you actually paid the dealer.

You take 40 percent off. That is before there is any calculation for a wholesale allowance, right?

THE WITNESS: Right.

THE COURT: So that brings it down to six dollars. Then they figure three percent of six dollars which is 18 cents, I guess. That gives you calculated net of $6.18.

Do you pay $6.18 or do you pay something less to take into account the wholesale incentive allowance?

THE WITNESS: At that point the 6.18 would be invoiced to us.The actual wholesale incentives would be collected at a later date.

THE COURT: How is that collected?

THE WITNESS: That is collected on a form supplied by Ford Motor Company.

THE COURT: Tell me how the wholesale allowance is applied or whatever is done, forms and so forth, the whole story.

THE WITNESS: In the first place you ascertain if the customer is eligible for wholesale incentive.

THE COURT: You are who?

THE WITNESS: Let's say as a representative of Central in the early years when we were using 11283 code or previously is a 13430 code, so on each invoice we would enumerate the amount of eligible incentive available on the item.

THE COURT: Invoice from whom to whom?

THE WITNESS: From us to the customer, to our end user.

THE COURT: So if you sold it to a body shop --

THE WITNESS: The incentive would be shown on the bottom of my invoice. That invoice number is then transferred to a Ford Motor Company form.

THE COURT: FLM sells -- let's take a ten dollar part. You bought it for $6.18, or you have been invoiced $6.18 by Central, right?

THE WITNESS: Right.

THE COURT: You turn around and what would you sell it for?

THE WITNESS: Ten dollars less 25 percent.

THE COURT: So you sell it for $7.50, right?

THE WITNESS: Correct.

THE COURT: And you invoice it, you give an invoice to your customer. What does that invoice say?

THE WITNESS: That shows the end figure as to customer's cost which would be $7.50 at that point and on the bottom of it we would calculate the incentive available on that sale which, in this particular instance, would be 25 percent off of six dollars.

THE COURT: Do you have a notation?

THE WITNESS: Yes.

THE COURT: What does it say?

THE WITNESS: Mostly we just mark W. Sometimes we just mark E for eligible, but sometimes we mark W, wholesale incentive, but in most cases we mark E.

THE COURT: What do you say, E 25 percent?

THE WITNESS: E and the dollar amount.

THE COURT: Here two dollars and a half?

THE WITNESS: $1.50, 25 percent of the actual dealer cost which was six dollars.

THE COURT: I thought it was 25 percent of ten dollars.

THE WITNESS: 25 percent of the ten dollars was my selling price to my customer.

THE COURT: So you take off 25 percent of six dollars?

THE WITNESS: Right, which would be the wholesale incentive.

THE COURT: And that would be a dollar and a half?

THE WITNESS: Right.

THE COURT: So you would be selling it at ten dollars minus a one and a half for eight dollars and a half, right?

THE WITNESS: Ten dollars minus 25 percent.

THE COURT: Ten dollars minus 25 percent of six dollars?

THE WITNESS: Minus 25 percent of the suggested retail figure. My cost to my customer would be the suggested retail price less 25 percent.

THE COURT: You bought the part, you have been invoiced $6.18 by Central. You are going to sell to the customer, your customer and you invoice him ten dollars less 25 percent?

THE WITNESS: Correct.

THE COURT: What is that for?

THE WITNESS: That is the normal trade discount to wholesale customers.

THE COURT: What do you mean "wholesale customers?" He is a body shop, isn't he?

THE WITNESS: That would be considered a wholesale customer.

THE COURT: You call him a wholesale customer?

THE WITNESS: Right.

THE COURT: He is going to do the repairing for some auto owner, right?

THE WITNESS: Right.

THE COURT: Why is he a wholesaler?

THE WITNESS: At that point he would be a wholesaler account of mine.

THE COURT: Who is the wholesaler, you or him?

THE WITNESS: I am wholesaling the part to my customer. You could actually call him a retail user.

THE COURT: You are the wholesaler?

THE WITNESS: If you wish, you could call him a retail user.

THE COURT: But that is the last thing in the chain of distribution, isn't it? He repairs somebody's car?

THE WITNESS: Right.

THE COURT: So you would give him the normal trade discount of 25 percent, then at the bottom you mark E meaning eligible?

THE WITNESS: Yes.

THE COURT: Then what do you do?

THE WITNESS: The eligible wholesale incentive on the particular sale demonstrated would be $1.50 which is then

transferred to a form.

THE COURT: You put that on the invoice and subtract that from the $7.50?

THE WITNESS: No, I do not subtract that. It is retained in our operation.

THE COURT: You do not pass that on to him?

THE WITNESS: It is not passed on.

THE COURT: What do you do? You have these invoices with markings of E. What do you do with them?

THE WITNESS: The dollar amount marked on the wholesale incentive claims are transferred to a Ford Motor Company --

THE COURT: What is transferred to the Ford Motor Company form?

THE WITNESS: The eligible amount, which in this case is $1.50.

THE COURT: Do you write anything else on the Ford Motor Company form?

THE WITNESS: Our selling invoice number which identifies the particular sale.

THE COURT: What do you do, identify the customer?

THE WITNESS: Just the invoice number.

THE COURT: And the amount of the sale --

THE WITNESS: Just the amount of the incentive, not

the amount of the sale.

THE COURT: And you calculate the amount of the incentive, right?

THE WITNESS: Yes.

THE COURT: How do you calculate the amount of the incentive?

THE WITNESS: It is printed in the price list of the Ford Motor Company.

THE COURT: And this can vary from what?

THE WITNESS: It is normally 25 percent. There may be differences in pennies, but it is very minute.

THE COURT: And the reason you get an average of 16 percent is that there are some items that are just not eligible at all?

THE WITNESS: Correct.

MR. MAC CRATE: Your Honor, I think there may be an ambiguity in the record, unless we fix this as to time.

THE COURT: Did anything I have been asking you change during the time you were taking the wholesale incentive allowance? Was this your procedure?

THE WITNESS: Yes, it was.

THE COURT: Do you say there was a change in some formality?

MR. MAC CRATE: There has been a change in reporting

and I am not clear at the moment, your Honor, as to the date of that change and I wanted to be sure we didn't have an ambiguity later.

THE COURT: We can work that out.

Here it would be 25 percent of six dollars. How much would you make then on that part? You would make the difference between --

THE WITNESS: The difference between $7.50 minus $6.18 plus $1.50.

THE COURT: Go through that again.

THE WITNESS: It would be my selling price which was $7.50 less my actual cost of $6.18 plus $1.50 wholesale incentive, would be my actual profit.

THE COURT: I get $2.82.

MR. JULIEN: That is correct.

THE COURT: I do not know whether it is meaningful, but actually this wholesale incentive is something that you would assume that Central would get too, right? They would, they would get it from Ford?

THE WITNESS: Yes.

THE COURT: I do not know whether it is meaningful to talk about mark-up, but if we were trying to figure your gross profit on your selling price, what would you consider your selling price, your purchase price is? Your purchase

price would be really the 6.18 minus $1.50, right?

THE WITNESS: Correct.

THE COURT: And that would be $4.68, $6.18 less $1.50.

So you were making $2.82 on a $6.18 cost?

THE WITNESS: Right.

THE COURT: Let's take a little break.

(Recess)

MR. MAC CRATE: Your Honor, I would like to make a note for the record of what has transpired this morning.

At 11:10 a.m., I was handed a subpoena with an enumeration of three items for production of enormous scope and breadth.

At 11:35 a.m., I was handed an addendum to that subpoena adding an additional burdensome request for documents and most recently, at 12:20, I have now received for the first time plaintiff's proposed assessment of damages.

I simply wanted to record these facts at this time to indicate the extremely difficult conditions under which we are trying to defend this case.

MR. JULIEN: I think in fairness, if your Honor pleases, the record should also indicate that yesterday a subpoena of great breadth was served upon us calling for documents of the plaintiff.

THE COURT: Does anybody have any applications?

You have not signed this, this specification of damages, Mr. Julien. Why don't you do that.

Okay. We have a 60 percent profit on that part we were talking about, 2.82 on 4.68?

THE WITNESS: No,your Honor. On that part I believe it would work out to be approximately 37 percent.

THE COURT: You received from your customer seven dollars and a half, right?

THE WITNESS: Yes.

THE COURT: Let's figure out what you paid. You paid $6.18 less $1.50 or $4.68, right?

THE WITNESS: Right.

THE COURT: I do not know any way to figure your gross profit except to start with the cost which is $4.68, subtract that from $7.50 which leaves a profit in dollar terms of $2.82 and see what percentage $2.82 is of $4.68.

Can you figure out any other way to do it?

THE WITNESS: Yes. Gross profit would be derived at by selling price less cost price divided by selling price.

THE COURT: Go through the calculation. Selling price is $7.50?

THE WITNESS: Less our actual cost which was $6.18.

THE COURT: No. You did not pay -- you paid Central

$6.18 less $1.50?

THE WITNESS: Okay.

THE COURT: That is $4.68?

THE WITNESS: 4.68 divided by $7.50 to arrive at gross profit.

THE COURT: $4.68 subtracted from $7.50 would give you your dollar profit?

THE WITNESS: It would be 4.68 subtracted from $7.50.

THE COURT: To give you $2.82?

THE WITNESS: Divided by $7.50 to arrive at gross profit.

THE COURT: You are taking profit as a percentage of selling price?

THE WITNESS: Correct.

THE COURT: Obviously that is right.

Go ahead.

BY MR.JULIEN:

Q In the example we have employed, we have taken the entire 25 percent whereas with other items, there will be no wholesale incentive so the overall wholesale incentive would be 16 percent.

THE COURT: What is the evidence on that? He had just given us a bare summary.

MR. JULIEN: The witness has testified, if your Honor

pleases, that averaging out three years of experience under this plan has resulted in a wholesale incentive for all crash parts at 16 percent rather than the 25 percent.

THE COURT: That is his statement and I do not know whether there would be any cross examination or contradiction on that.

MR. JULIEN: This is disputed by audits which we will present you with.

THE COURT: Go ahead.

Q In addition to your cost in the example given to you by the Court, is there not an additional item of profit existing of the stock order allowance?

A Yes, there is.

Q Has there been based upon your business experience in your business, has there been an averaging out of which items fall under the stock order allowance and which are just without the stock order allowance?

A The stock order allowance would be based on orders placed on a weekly stock order which, in our case, would be approximately 50 percent of the use of a code number.

Q 50 percent of what?

A 50 percent of our total purchases.

Q Since you gave us the stock order discount at five percent, would two-and-a-half percent of all of your purchases

reflect the benefits you were receiving under the stock order plan?

A It would.

MR. JULIEN: To prevent any confusion with respect to that, I state to the Court that in this case the auditor in the presentation of the figures which your Honor now has a copy of, carries it at two percent rather than at two-and-a-half percent.

THE COURT: Shouldn't I rely on your specification?

MR. JULIEN: I think you are entitled to. I am just saying we are taking the lesser rather than the greater number.

Q Prior to your wholesale incentive being cut off, did you know the firm of Atlas?

A Yes.

Q They had succeeded to Central with whom you had been doing business?

A They succeeded Central in July of 1972.

Q At that time, were you continuing with the arrangement that you had had with Central, as that continued with Atlas for any period of time?

A Yes.

Q Tell his Honor for how long?

A We continued with Atlas until November of 1972. From

July to November of 1972.

Q Prior to the end of your wholesale incentive allowance in November of 1972, a week or two prior to that time, had you been approached by any other franchise dealer of the Ford chain?

A Yes.

Q Please tell us who that was.

A Thomas Motors, Inc., Yonkers, New York.

Q From your experience in this field, is Thomas Motors a dealer development franchise company?

A Yes.

Q By dealer development, you mean what?

A I mean that Ford holds the controlling voting shares in the corporation.

Q Ford Motor?

A Ford Marketing Corporation.

Q Holds controlling shares in Thomas?

A Yes.

Q Who from Thomas approached you just before your wholesale incentive allowance was cut off?

A Their parts and service coordinator.

Q Do you know his name?

A I only knew him as Phil. I never did know his second name.

Q Did he come to your place?

A He called me.

Q What transpired?

A I went over to Thomas Motors and we discussed the possibility of them selling us parts.

Q Had he asked you to come over for that purpose?

A He asked me over for that purpose. This would be October of '72.

Q Was there anything said about the arrangement under which you were at that time making your purchases from Atlas?

A Yes. In other words, at that time --

Q Did you tell him what they were?

A At that time we discussed the arrangements and the possibility of them doing business under the same arrangements.

Q Had he solicited you for this?

A He solicited us.

MR. MAC CRATE: I object.

THE COURT: Sustained.

Q Had this been initiated by the Thomas people?

MR. MAC CRATE: Objection, your Honor, "Had this been initiated." Was there a telephone call received is one thing.

THE COURT: I think he has already testified that the telephone call came from Phil and he went over to see Phil.

Q In a telephone call, had you been told what it was he wanted to see you about?

A Yes. He asked me if it would be possible for us to discuss --

MR. MAC CRATE: I move to strike. We are going to get into a very difficult area here with a lot of testimony about third parties and what they are saying to Mr. McKee.

THE COURT: What is the objection?

MR. MAC CRATE: The objection is a hearsay objection.

THE COURT: Sustained.

MR. JULIEN: I say to your Honor, in view of the stipulation concerning the cutoff and our contention that it is enforced through the dealers under our conspiracy allegation, what the dealers do and say is perfectly admissible. Traditionally in these anti-trust cases where a conspiracy is alleged, we say through Ford's pressure the dealers carry out what Ford mandates and what they say and what they do is admissible.

MR. MAC CRATE: That does not make every casual conversation that a third party has with this witness admissible against Ford. What we are going to have to do is to go out and find witnesses all over the country to respond to what Mr. McKee says someone told him.

MR. JULIEN: You don't have to go all over the

country. This is one of your dealer development corporations which you control and they are right here and they are not all over the country and we say that as a result of Ford's instructions and orders, the franchise dealers are carrying out its bidding which necessarily --

MR. MAC CRATE: Besides the fact that Thomas has burned down, is in bankruptcy and is no longer.

THE COURT: If this were a criminal case and the Government alleged that someone was a co-conspirator, hearsay testimony about statements of the co-conspirator would be received subject to some degree of connection.

You are saying that Thomas was a co-conspirator?

MR. JULIEN: Is that every franchise dealer in this area was a co-conspirator to the extent that once Ford had emasculated our participation in this plan, each of its franchise dealers was mandated and required to go along.

THE COURT: What evidence do you have that Thomas was somehow specifically directed or told or communicated with about Thomas' dealings with FLM?

Are you going to be able to elicit any evidence which will really connect up Thomas as an actual conspirator with FMC or Ford in this case?

MR. JULIEN: Yes. I will be able to show your honor that after this conversation, the wholesale incentive was cut

off, then we go to Atlas.

THE COURT: That is not an answer to my question.

MR. JULIEN: And Thomas carries out the same principle, that they cannot sell us and allow us the wholesale allowance by that means, inferentiallywe do connect them and no direct evidence is required.

THE COURT: It is stipulated that Ford at a certain point changed its policy and refused to allow the wholesale allowance to any and all dealers who sold to FLM.

MR. JULIEN: Precisely, and I take off from there.

THE COURT: May I just finish?

MR. JULIEN: Yes, indeed.

THE COURT: I do not think that makes anybody a co-conspirator. It may or may not involve Ford in a liability under Section 1, but I do not know that just because Ford changes its discount conditions that all of a sudden all the dealers become co-conspirators so we can have hearsay testimony admitted by all the dealers binding on Ford and it just seems to me that is carrying it too far.

If you have some evidence which really shows some actual collusion or communication or combination between Thomas people and Ford, a mutual cooperative decision to cut out FMC or something like that, then maybe you could admit Thomas' statements as binding on Ford, but right now, I do not

think there is any showing and I do not think you even indicated you intend to make a showing.

I will sustain the objection.

MR. JULIEN: I am prepared to show,taking off from the stipulated statement of facts with respect to the cut-off, I am prepared to show that this vertical arrangement emanating from Ford prohibiting its dealers from dealing with us necessarily entails that the dealers are abiding by, because of pressure --

THE COURT: What else can they do?

MR. JULIEN: Exactly.

THE COURT: Ford is the one that decides whether to grant the discount or not.

MR. JULIEN: Then what they do in pursuance of this plan is admissible as part of this vertical arrangement, just as it would in a criminal case. There is no different rules in a civil case. If Ford has either by persuasion or agreement compelled its dealers --

THE COURT: There is another face of the exception to the hearsay rule, the statements to be made in furtherance of the conspiracy. When Phil called Mr. McKee and said,"Come on over and talk," and then Mr. McKee went over and Phil and McKee talked about the possibility of Thomas selling FLM parts, was that a statement or were those statements by Phil

in furtherance of the conspiracy? No.

MR. JULIEN: They are to this extent. They will demonstrate to your Honor that two weeks before this allowance is cut off, Thomas, a Ford agent and which itself has majority interest in. is willing and anxious to sell to our client, and then we approach the same Thomas when we are cut off and asked for the same arrangement with the allowance --

THE COURT: I will sustain the objection.

If Phil comes in pursuant to subpoena and testifies at length, that may be another matter, but I will not let this man testify as to what various people told him who are not connected with Ford.

MR. JULIEN: Respectfully except.

BY MR. JULIEN:

Q When were you informed that your allowance for wholesale incentive was no longer to be available to you?

A Sometime in November of 1972. Possibly it could have been late October, but I would say November.

Q By whom were you so informed?

A By Mr. Pollack of Atlas Lincoln-Mercury.

Q Was he the principal in the Atlas company?

A Yes.

Q What did he tell you?

MR. MAC CRATE: Objection. It calls for hearsay.

MR. JULIEN: This is in furtherance of the plan, your Honor.

THE COURT: I suppose this is a little closer question. There is no jury here. I will hear the testimony and entertain a motion to strike.

A I was told by Pollack that the wholesale incentive would not be available to FLM on purchases made up to that date. He had been so advised by Ford Motor Company and at the same time he also advised me that Ford Motor Company or someone in Ford Motor Company had told him not to sell to FLM.

MR. MAC CRATE: I move to strike.

MR. JULIEN: I think you ought to hear just a trifle further.

THE COURT: This is the kind of thing which is exactly the reason for the hearsay rule, but I will hear the rest of the answer and I will decide the motion to strike.

Q Did you at or about the same time present any orders in the usual --

THE COURT: Did you finish your answer about what was told to you by Pollac?

THE WITNESS: Yes.

THE COURT: I will strike the answer to the extent that it simply deals with the cessation of the discount, it simply reflects the stipulation. To the extent it speaks of a

directive by Ford not to sell further.

Let me hear that again.

(Record read.)

MR. MAC CRATE: I move to strike everything after "he told me."

MR. JULIEN: There is an additional piece of evidence that can be considered with respect to the implementing of this plan. The presentation of an order or orders at or about that time and what happened with respect to it.

THE COURT: What is your argument about? Let's take the portion that Mr. MacCrate has moved to strike. What is your statement about the admissibility of that?

MR. JULIEN: I say what this dealer with whom we were dealing did in the implementation of Ford's instructions becomes admissible and what he says about instructions received from the principal progenitor of this plan to cut out the incentive likewise becomes admissible.

THE COURT: What is the evidence that Pollack was a co-conspirator? I guess your argument would be by acquiescing in this, Pollack became a co-conspirator and that this stated delivery of the bad news to McKee was in furtherance of the conspiracy. He had been told by Ford and he was just relaying the information.

MR. MAC CRATE: This suffers from all the impediments

of hearsay.

THE COURT: But there is this exception in a situation where you have a conspiracy charge.

MR. MAC CRATE: But there has been no evidence of a conspiracy to which Mr. Pollack is a party. It is just a broad extension of any possible inference here to suggest that Mr. Pollack was in a conspiracy with Ford when he had this conversation. There is no evidence of that.

THE COURT: Mr. Julien is really saying, this is evidence. In other words --

MR. JULIEN: The cases which have dealt with these evidentiary problems have clearly said it is not necessary to show by actual proof, which is so often undiscoverable that the parties have gotten together and said we will conspire.

THE COURT: I know that, Mr. Julien. The point is, and again, the criminal rule is, if we can use it and I think we can, in order to make this kind of hearsay testimony, hearsay declarations of an alleged co-conspirator admissible, you have to have a certain degree of non-hearsay independent of the existence of the conspiracy and of the whole of the co-conspirator as such and I do not think you have gotten to that point, so Mr. Mac Crate certainly has the right to press his objection.

MR. JULIEN: May I make this additional suggestion,

your Honor?

THE COURT: I will take it. I think I will do what we do in a criminal case. I will take it subject to connection, but I will say to you right now, I do not regard the evidence as offering any independent proof of conspiracy between Ford and Atlas or Pollack, and I do not regard the mere fact that Ford changed its discount terms to create a conspiracy between Ford and all its franchise dealers. I think conspiracy means something beyond just being a dealer receiving a bulletin about discounts.

What I think a conspiracy under Section 1 would have to involve, conspiracy has an opprobious meaning, really a criminal meaning, and it seems to me that the conspiracy would have to involve a really willing participation by some dealer in some activity with Ford and something beyond just receiving terms of a discount situation.

If you produce independent evidence of a conspiracy, then the hearsay evidence exception I will consider. If not, I will strike it at the end of the trial.

MR. JULIEN: Of course your Honor has in mind the cases we have briefed, which indicate that while conspiracy may be a word of opprobrium, conspiracy can be effectuated by that kind of economic pressure which compels other members to do one's bidding. It does not require consenuality.

THE COURT: Look, we have labored this. I will receive it and we will adjourn to 2:15.

MR. MAC CRATE: Before we conclude, may I point out that the effect of your ruling of taking all of this, places upon us the burden of seeking out individuals to come in and challenge the veracity of this witness.

MR. JULIEN: This was laid out in a motion for an injunction pendente lite.

THE COURT: I would assume among the elements of proof you would have somebody to testify that there was no direction by Ford to stop doing business with FLM. You tender that kind of idea in your proposed findings.

MR. MAC CRATE: We will certainly have Ford people who can speak to that, but here is the suggestion that someone is speaking for Ford and making a statement out of the presence of Ford, and I submit that should not be binding upon Ford.

THE COURT: I am saying it does not have a lot of weight and if Mr. McKee says that Pollack said that he was told by Ford not to sell, frankly I do not think it has a lot of weight. People always blame somebody else for actions that they want to do for a variety of reasons, so that is not too helpful, but it seems to me the only thing I can do is to take it subject to connection, and I do not think it really

imposes a tremendous burden on Ford in addition to the burden that Ford has already probably assumed.

You were going to have evidence that there were no directions given so this does not change that.

We will adjourn until 2:20.

(Luncheon recess.)

AFTERNOON SESSION

2:20 p.m.

S T E P H E N M C K E E , resumed.

DIRECT EXAMINATION CONTINUED

BY MR. JULIEN:

Q At or about the time of this conversation you had just given us prior to the recess, had you attempted to order any merchandise from Ford through the Atlas code number in October of 1972 or November of 1972?

MR. MAC CRATE: Could we fix what conversation we are referring to?

MR. JULIEN: The last one when he had this conversation with Mr. Pollac.

A Yes, to your question.

Q Could you give us an idea of the time interval with respect to your attempting to place the order and the conversation you gave us with Mr. Pollack, same day, before, after, which?

A Same day.

Q What had happened?

A I placed an order on Ford Motor Company in the normal manner by telephone. Nothing was said. I called back later to place an afternoon order. It was told, "Your orders are being held. Each order is being taken to the front office."

Q Was it following that information that you had communicated with Mr. Pollack?

A Yes.

Q Is that when that conversation took place?

A Yes.

Q This order that you placed with Ford on that day, was it ever filled?

A No.

Q Were you ever able to get another order filled through the Atlas code?

A No.

Q Did you try?

A I did not try.

Q Following this information -- by the way, in this conversation that you had with Mr. Pollac, did he tell you who in Ford had given him the information he imparted to you?

MR. MAC CRATE: Objection.

THE COURT: Overruled.

A Yes. He mentioned the name of Mr. Rose.

Q Is Mr. Rose in the courtroom now?

A Yes, he is.

Q After the cessation of business with Atlas, whom did you go to next in an effort to get Ford parts, if anybody?

A Thomas Motors.

Q About how much time elapsed from the time you were told you could get no more through Atlas to the time you went to Thomas Motors?

A The same day.

Q Without giving us the extent of the conversation, was this the same party with whom you had had a conversation some two weeks before your cancellation?

A No. This time I spoke to the dealer principal.

Q The same company?

A Yes.

Q What happened on this occasion?

MR. MAC CRATE: Again, your Honor, if this is going to call for testimony as to what another individual said who is not a Ford employee, I object to this as hearsay.

THE COURT: Who is the dealer principal, do you know his name?

THE WITNESS: Mr. Baldassare.

THE COURT: I will receive it subject to connection on the same basis as I received the hearsay testimony before.

Q Go ahead, you may tell us.

A I telephoned Mr. Baldassare and set up an appointment to meet him that same afternoon. I went to his office and arranged to purchase parts through his organization under his dealer code.

Q Did you ask for the wholesale incentive to be afforded you?

A Yes.

Q Were you given the wholesale incentive?

A No, I was not.

THE COURT: The testimony so far is not even subject to connection. If we come to a point where there is some hearsay testimony of a different kind, we have a connection problem, but we do not have that yet.

Q How about the order -- what is that category?

A Stock order.

Q Yes. Did you ask for that?

A We discussed the general terms under which he would supply FLM.

Q And they were what?

A The general terms, five percent over dealer cost, but this time paying by the week instead of by the month. Stock order discounts would not be allowed. Obsolescence returns were on the face of it agreed upon but never consummated in any manner.

Q You mean never allowed?

A Never allowed, and at that point he called in his parts manager and placed the order I had turned down previously the same day.

Q You are referring to the order that you had attempted to place through Atlas?

A Yes.

Q In addition to this concern, have you purchased some crash parts through the code of a dealer up in Pleasantville?

A Yes, I have.

Q The name of that?

A Pleasantville Ford.

Q What is the arrangement you were able to obtain through the purchase of parts from that agency?

MR. MAC CRATE: I object to listing through oral testimony.

THE COURT: Overruled.

A The same arrangement. Dealer cost plus five percent, but this time not payable by the week, but the dealer then asked for a payment of approximately 25 percent of our purchases to be paid by the week.

Q How about the allowances, wholesale?

A No other allowances.

Q You told us before that Thomas is a dealer development agency. Is Pleasantville a dealer development agency?

A No. Pleasantville Ford is privately owned.

Q In this metropolitan area other than Thomas, were there other dealer development agencies at that time?

A Yes, there were.

Q Who were franchise dealers in this area?

A Yes.

THE COURT: Central and Atlas were not dealer development, were they?

THE WITNESS: Central was privately owned. I could not state as for Atlas.

Q Could you give us the names of some that were dealer development, controlled by stock or otherwise of Ford?

THE COURT: What difference does that make?

MR. JULIEN: We are showing now that even in the horizontal line of dealer franchises, Ford itself has a measure of control other than its strictures, by actual corporate ownership of some of these dealers.

THE COURT: Did he go to any of these people?

MR. JULIEN: Yes. He bought through one of them, the first one we mentioned, Thomas.

THE COURT: I guess you want to show who you claim Ford was protecting.

Go ahead.

A Dealer developments in our general area would be listed such as Empire Ford Sales in Mount Vernon; Parkview Lincoln-Mercury in Yonkers. I believe Manor Lincoln-Mercury in White Plains.

Q These are all Westchester County franchises?

A Yes. At that time Gotham Motors in Manhattan, now known as Manhattan Ford Lincoln-Mercury I believe is the correct name of it.

MR. MAC CRATE: Could we establish the time to which the witness refers?

Q I am asking you about the period when your purchases through Atlas had stopped.

A That is the time I am applying this to.

Q Are there any others that you recall?

A I cannot verify for the particular ownership of each dealership. Those I know to be dealer development.

Q In Westchester County?

A Yes.

Q You were telling me about the terms of payment. Would you tell us please while you were operating through Central and subsequently through Atlas, what were the terms of payment then, the credit terms?

A The credit terms were 30 days.

Q From the time when you began to make your purchases through Thomas and through Pleasantville down to the present time, is that the method which your company has operated?

A Yes.

Q Would you tell his Honor, please, what your margin

of profit is on merchandise purchased through Thomas and accordingly through Pleasantville?

A 15 percent.

Q As compared with what percent that you enjoyed before while dealing with Central and Atlas?

A We had been as high as 33 percent.

Q 15 percent is gross?

A Gross.

THE COURT: So you are saying that it has been 15 percent since you could not get the wholesale incentive discount?

THE WITNESS: That is correct.

THE COURT: I guess you could not get the stock order discount and the obsolescence discount?

THE WITNESS: Correct.

Q Are you able to operate profitably under 15 percent gross profit?

MR. MAC CRATE: Your Honor, I object. I thought we were going to have a detailing of how this was computed, but now to jump right through --

THE COURT: Overruled.

A No.

Q Will you describe to his Honor what has happened with respect to your operations since this change in the margin of

profit afforded you took place?

A My operation -- now I am at the stage where capital has gone. We have had to reduce our inventory. We have discontinued all pension funds.

Q Did you have a surplus at the time as we came into October, November, 1972?

A Yes.

MR. JULIEN: We will give detail on that.

Q What has happened to that?

A It has dropped to approximately ten percent of what it was.

Q Do you happen to know the figure it was?

A I believe it was somewhere around 140 to 160-odd thousand. I am guessing.

MR. JULIEN: We will have the figures.

Q Insofar as your customers are concerned and your competitiveness with others with respect to your customers, has there been some experience relative to that?

MR. MAC CRATE: I object to using the word "competitive" in a complex question.

THE COURT: Overruled.

A Yes.

Q Will you tell his Honor what has happened there?

A In the meantime we now have had Ford dealers

competing pricewise. In other words, cutting prices beyond what is the reasonable trade discount or what had been the trade discount in our general area.

THE COURT: I don't understand. Ford dealers who are doing what, repairing, selling or what?

THE WITNESS: Selling to body shops, selling to service stations, etc.

Q To people whom you sell to?

A Correct.

THE COURT: Ford dealers are doing what?

THE WITNESS: Cutting prices.

THE COURT: So, they are cutting their prices.

THE WITNESS: They are cutting their prices exactly to cost.

Q That is, their cost?

A To dealer cost.

Q But they are receiving the wholesale incentive?

A Correct.

Q Are you able to compete without the wholesale incentive?

A No, I am not.

Q Just before this cessation of your ability to purchase through Atlas under the circumstances and conditions which you were purchasing, had your company been engaged in

any plans for its growth or expansion?

A Yes, we have.

Q Would you tell his Honor about that?

A We had plans for buying larger premises. Also plans to franchise other operations like ourselves.

Q Has there been any continuance of the growth of sales as shown in the stipulation of facts? What had been your margin of growth average year to year?

A I would say we were averaging -- after the second year, I believe we were averaging 15 percent growth. I don't have figures in front of me.

THE COURT: You mean growth in sales?

MR. JULIEN: Yes.

Q Have you maintained that growth in sales since the termination of this arrangement?

A Sales have fallen off.

Q Are you doing the same measure of soliciting or attempting to get sales now as you were before, and if not, why not?

MR. MAC CRATE: Objection, "measure of solicitation."

THE COURT: I would like to have his testimony instead of your words. Again, he is not an adverse witness. Why can't you ask him what has happened?

Q What has happened about sales?

A We are doing the same soliciting by telephone and by visits to the body shops and we find that some of our body shops are buying from other sources at better discounts than we can afford to give.

Q Now I want to revert back, and once again bring up for his Honor's attention the conversation you had with the Thomas people two weeks before you were cut off from Atlas.

MR. MAC CRATE: I object.

THE COURT: Overruled.

Q Please tell us what was said.

A At that time we discussed in principle the supply of parts by Thomas to FLM, at which time we discussed buying on the same basis as we were buying from Atlas, including receiving wholesale incentives.

Q Was that the thrust of the conversation?

A That was the thrust of the conversation.

MR. JULIEN: If you will allow me to check my notes for a moment.

(Pause)

MR. JULIEN: At this time if your Honor pleases, I wish to offer 55 and 40 heretofore marked for identification in evidence.

MR. MAC CRATE: No objection, your Honor.

xx (Plaintiff's Exhibits 40 and 55 received in evidence.)

MR. JULIEN: Exhibit 55 is a letter dated February 3, 1971 from Central Lincoln under the signature of a Nathan Gordon, president, to Mr. J. R. Rose, district sales manager, and so forth.

"Dear Mr. Rose:

"As you are aware on February 1, 1971 a long and profitable association between us and FLM Collision Parts, Inc. was brought to a close with the withdrawal of parts code 13430. However, we are attempting to overcome the many obstacles created by this move and do herewith authorize FLM Collision Parts, Inc. in the persons of Steve McKee and John Andidero to order and pick up their parts needs and further authorize your division to charge same to our parts code 11283."

Exhibit 23, I will just take one paragraph -- I will come back to 40. In sequential order --

THE COURT: Are you introducing 55, 40, and 23?

MR. JULIEN: I beg your Honor's pardon. 23 is being offered.

MR. MAC CRATE: No objection.

(Plaintiff's Exhibit 23 received in evidence.)

MR. JULIEN: 23, your Honor, is a field contact report on Autolite Ford's form dated December 2, 1970 under the signature of J. R. Rose. Individuals contacted Mr. Steve

McKee, principal of FLM Collision Parts. Mr. I. Kramer, general manager, Central L & M.

"This date the writer was visited by Mr. I. Kramer and Mr. Steve McKee, the principal of FLM Collision Parts, Inc., a wholesaler of Central L & M. Mr. Kramer requested that since Mr. McKee had been a valuable customer of Central that we allow him to be part of a discussion relating to the recent cancellation of a separate parts code of Central L & M's which was used by this account."

I am skipping a paragraph.

"It was indicated to Mr. McKee that the dealer was responsible for a wholesale business on Ford brand parts and that as long as sales on Ford brand parts were made to independent outlets rather than other Ford or Lincoln-Mercury dealers, they would continue to qualify for the wholesale incentive."

There is more to that exhibit, but for the moment that will be sufficient for me.

40, if your Honor pleases, is another field contact report and this is dated January 10, 1973.

MR. MAC CRATE: Excuse me, Mr. Julien. Is the letter part of that Exhibit A attached?

MR. JULIEN: Yes, it is.

MR. MAC CRATE: It is a two-page document?

MR. JULIEN: Yes.

The name of the firm concerning which the contact is made is Atlas. Individual contacted, Mr. David Pollack. The report says:

"Received attached letter from Mr. J. R. Rose."

By the way, the report is signed by Mr. F. Sanchez, who is a zone manager for forward marketing.

"Received attached letter from Mr. J. R. Rose on December 15, 1972. Called on Atlas Lincoln-Mercury on December 18, 1972 and found that Mr. Pollack's --

"Called on Mr. Pollack on January 10, 1973 and reviewed all policies and procedures with particular regard to the qualifications for wholesale incentive for wholesale accounts, 'persons engaged in automotive service and repair, etc.' Assignment has been carried out as directed."

The direction is found in the letter annexed which is part of the same exhibit and this is a letter from Mr. Rose to Mr. Sanchez, copies to other persons in the hierarchy.

THE COURT: What is the date of the letter?

MR. JULIEN: December 6, 1972.

Subject, Atlas Lincoln-Mercury.

"Subject dealer has been in business for approximately five months and a problem developed recently with

regard --"

THE COURT: Can I just read it? I will read it right now.

(Pause)

THE COURT: Do you have any more questions of this witness?

MR. JULIEN: Very little more, your Honor.

THE COURT: Let's move on.

Q During the period that you did business with Central and through Central, could you give us an idea of how your volume sales compared with Central's volume wholesale sales to customers other than yourself?

THE COURT: I do not understand the question. What is the question?

MR. JULIEN: I will put it differently.

Q During the period you were doing business [illegible] Central, do you know how the volume of sales through your concern compared with the wholesale sales accomplished by Central other than through your concern?

A I would answer your question that we were possibly doing eight to ten times more than they were.

MR. JULIEN: That is all, your Honor.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. MAC CRATE:

Q Mr. McKee, you have had a long familiarity with the distribution of Ford parts, haven't you?

A Right.

Q And prior to 1965, you had more than twenty years of experience in this activity?

A Right.

Q And during that time, you became very familiar with how Ford parts were sold and distributed, did you not?

A Yes.

Q And you became familiar with where to look for the prices that were charged for parts, you knew about the price manual?

A Yes.

Q And you knew about the various policies and procedures that regulated sales?

A Yes.

Q And right up to this day, you have continued to have great familiarity with this subject, haven't you?

A Correct.

Q Would you identify for us one by one the various dealerships in which you operated as a parts manager or assistant parts manager to which you earlier testified, at

which you worked from 1945 right on to 1965?

A March of 1945 I started in R. E. Hamilton and Company in Belfast, Northern Ireland, the main Ford dealer. That is quite different from what the setup is in this country.

In 1954 I emigrated to Canada. I worked at that time in a company called Little Brothers Ford, Ltd. in Weston, Ontario. For approximately two years I was then assistant to the general manager of an English company called Wayside Equipment Company using only Ford parts in the manufacture of construction and loading equipment.

In 1960, I came to this country. I moved to Los Angeles. I found a job in the parts department in Los Angeles. I don't really remember the name of the company. I worked in it for two weeks and decided that Los Angeles wasn't for me.

Q This was a franchised dealer in Los Angeles.

A Yes. Moved from Los Angeles to New York City and went to work in what was Empire Lincoln-Mercury. The period would be late 1960 when the name was changed from Parkin Motors to Empire. I started work the day it became Empire.

The fall of 1960, I went to work for Barry Motors in Paramus, New Jersey. Later that same year I became parts manager of Fennelli Ford, Tremont Avenue, in the Bronx. I

worked with them until March, early April of 1965 when I did go into forming the corporation FLM Collision Parts.

Q In your various responsibilities as parts manager, you became familiar with various forms that are employed by Ford in connection with the distribution of parts, claim forms and such documents?

A Yes.

Q And you have from time to time in more recent years, the years with which we are now concerned here, had occasion to prepare various forms that are Ford forms?

A Yes.

Q I would like you to look at Defendant's Ab identification and ask you if you can identify that form?

A Yes, I can. This is the application for incentives and allowances claimed on the sale of Ford parts.

Q In the particular case, the claim form that I handed to you, is a claim form prepared under what code number and what name?

A Under Central Lincoln-Mercury, code number 1123.

Q Does the claim relate to a particular month.

A July 1969.

MR. JULIEN: These exhibits, if your Honor pleases, are presently being shown, I have not had either a copy of them or are they on my list.

MR. MAC CRATE: There was a misunderstanding at counsel's table. We indeed do have copies.

Q I have handed you, Mr. McKee, Defendant's AV for identification and ask you to identify this.

A This is a summary of parts incentive or allowances.

Q For what account, code number and name does that apply?

A Central Lincoln-Mercury, 11283.

Q For what month?

A July 1969.

Q Would you explain to us what relationship is between AU and AV for identification?

A AV is the one in which the dealer actually enumerates all of his invoices to his eligible customers by using his invoice number and the amount of incentive entitled on our sale, which is then carried over to his actual claim on Ford Motor Company.

THE COURT: In other words, AV contains the detail?

THE WITNESS: Correct.

THE COURT: The day of the sale, the invoice number?

THE WITNESS: Or dealer's sales ticket might be a better way to describe it.

THE COURT: And the amount of the allowance claimed for incentive?

THE WITNESS: Right.

THE COURT: Then AU puts all that together and makes a claim for the total amount?

THE WITNESS: Correct.

Q Would you explain to the Court --

MR. JULIEN: I would assume that counsel intends to put this into evidence.

MR. MAC CRATE: There is indeed.

I offer it in evidence at this time.

THE COURT: Received.

xx (Defendant's Exhibits AU and AV received in evidence.)

Q There is a reference on AV to Code W and Code X. Would you explain to his Honor the meaning of those terms?

A Code X and Code W was never fully explained to me personally. From my knowledge of it, Code X was for items which were competitive which would have been bought from sources other than Ford Motor Company. Code W would be strictly items, as we call them, captive market items.

THE COURT: What is the difference?

THE WITNESS: One would be an item which could be bought from other sources.

THE COURT: What is Code X?

THE WITNESS: I assume that is the one assigned to other items other than captive items.

THE COURT: Code W?

THE WITNESS: Captive items.

THE COURT: What do you mean?

THE WITNESS: Items not available through any other source other than through Ford Motor Company.

Q Single sources, is that another term that is used from time to time?

A Right.

Q Would crash parts be within the category of single source parts?

A They would be.

Q But there would be other parts as well that would be included as Code W?

A I would expect at that time they were kept solely as Code X.

Q Now I show you Defendant's Exhibit AW for identification and ask you if you can identify for us that form?

A This is also an application for incentives and allowances claimed on the sale of Ford parts.

Q By what dealer?

A By Central Lincoln-Mercury Corporation.

Q Under what code number?

A 13430.

Q Is the address shown for Central Lincoln on that form?

A It is shown as 416 Sawmill River Road, Yonkers, New York.

Q I show you Defendant's Exhibit AX for identification and ask you please to identify what that is.

A AX is a summary of parts incentive or allowances.

Q On behalf of what dealer?

A Central Lincoln-Mercury Corporation.

Q What is the code number?

A Dealer code 13430.

Q Is an address shown?

A 416 Sawmill River Road, Yonkers.

Q What is the month covered by AW and AX for identification?

A July 1969.

Q That is the same month as was covered in the immediately preceding exhibits?

A The same month.

MR. MAC CRATE: I would over AX and AW in evidence.

(Defendant's Exhibits AW and AX received

xx

in evidence.)

Q Mr. McKee, I would like you to look at AU and at AW and explain who would have prepared those two forms?

A Both of these forms were prepared by Central Lincoln-Mercury.

Q They were prepared by Central Lincoln-Mercury in Brooklyn?

A I would say in Brooklyn.

Q And they are signed by --

A They are both signed by Hy Kramer.

Q Who is Hy Kramer?

A He is the general manager. He was the general manager of Central Lincoln-Mercury.

Q I show you AV and AX and ask you if you can tell us who prepared those respective sets of forms?

A AV would be prepared by Central Lincoln-Mercury in Brooklyn. AX would have been prepared by FIM Collision Parts in Yonkers.

Q How would AX be submitted to Ford?

A AX would be mailed to Central Lincoln-Mercury who would then summarize it on the form to Ford Motor Company.

Q So that the summary form which is AW would have been prepared at Central of the individual items totaled that appear in AX?

A Correct.

Q And you would have sent to Brooklyn to Central AX so that an appropriate cover sheet could be provided and the claim made by Central in Brooklyn; is that correct?

A That is correct.

Q In your testimony, Mr. McKee, you have been talking about how you placed your orders by telephone and that this was your normal way of doing business; is that correct?

A That is correct.

Q That the vast majority of your business is done on this basis?

MR. JULIEN: You mean order placing?

Q Your placing of orders?

A The majority of my business is done on a verbal placement of orders.

Q When you say "a verbal placement of orders," you mean picking up the telephone and speaking to an order clerk and saying under code so-and-so, "I want such-and-such parts?"

A Correct.

Q The only thing you have to say on the telephone is your code number and list the parts, isn't that a fact?

A Code number and identify the dealership.

Q You are always asked the dealership in addition to the code number?

A In the majority of cases, yes, unless when someone recognizes your voice and knows very well who you are.

Q The control number is the dealer code, is it not?

A Correct.

Q When you say this is the way you place the majority of orders, do I understand that this represents the bulk of your business?

A No. A lot of orders are placed on a written order, again using the dealer code, dealer name and in previous years marking the order particularly FLM pick-up so there would be no mixing of orders.

Q You have to indicate whether you want the parts shipped to an address or that they will be picked up by someone; is that what you are saying?

A Yes, that is indicated.

Q It is a common thing for any customer of a dealer, a franchise dealer to be authorized to pick up parts?

A No, it is not a common thing.

Q But it is done, is it not?

A It is done, but not as a common means of doing business.

Q Maybe we are quibbling over words --

MR. JULIEN: I object to that.

Q So far as the shipment of parts, is it not common

for goods to be shipped directly from Ford to the customer by a franchise dealer?

A No, it is not common.

Q It is your position that that is an exceptional thing, that it does not happen for dealers all the time.

A It will happen but not as a common rule of business.

Q You are distinguishing between someone who does it all the time and someone who only has it done occasionally.

A Correct.

THE COURT: When you phone the orders or when you did phone the orders, the phoning is to where, Teterboro.

THE WITNESS: Teterboro, New Jersey.

THE COURT: When you give the code number and the name of the dealer, that is the name of Central or Atlas or Pleasantville, as the case may be, correct?

THE WITNESS: Correct.

THE COURT: When you phone the orders in, do you say anything about FIM?

THE WITNESS: When using dealer code 11233, we did specify FIM pick-up.

THE COURT: On the phone?

THE WITNESS: On the phone.

THE COURT: Now you are using the Pleasantville

code number?

THE WITNESS: We no longer segregate the code number. We pick up the order and their parts for them.

THE COURT: In other words, you are phoning orders into Teterboro during this present time and you are using the Pleasantville number?

THE WITNESS: Correct.

THE COURT: And you don't say anything about FLM because you just pick up all the orders?

THE WITNESS: We pick up all the orders placed on the Pleasantville code number.

Q Don't you from time to time have parts shipped to you directly and not picked up?

A Yes, we do.

Q In that case, common carriers are used for delivery to you?

A Common carrier, yes.

Q You said earlier that back at the time you had this use of a second code, that you claimed a stock order discount, for the benefit of a stock order discount.

Isn't it a fact a stock order discount can only be claimed on written orders?

A Yes. Stock orders are all written.

Q Therefore, all of this telephone communication

that you have been referring to has nothing to do with any orders on which a stock order discount could be claimed?

A Correct.

Q Distinguishing from the delivery of the goods -- incidentally, with respect to the delivery of the goods, what piece of paper accompanies the goods either when you pick them up or when you get them from a common carrier?

A Packing slip listing the parts supposedly shipped on that order.

Q Is that commonly known as a shipper?

A A ship number is designated to each order.

Q This is for the physical movement of the goods that a shipper is prepared?

A Yes.

Q With respect to the billing, the bill for these parts does not accompany the parts, does it?

A No.

Q Have you from time to time seen the invoice statement, the charge, the bill for purchases of Ford parts?

A Yes.

Q And do you recall when you were using the second parts code 13430, did you receive those invoices in Yonkers?

A Yes. All invoices and all statements were mailed to Yonkers.

Q But addressed to Central Lincoln-Mercury?

A Correct.

Q Was there any indication on that billing that Central Lincoln-Mercury was there?

A None.

Q How did the postman know that he was to deliver all of these communications addressed to Central Lincoln-Mercury to you? Did you give him special notification of this?

A No, we never did notify the Post Office in any particular manner.

Q You have told us that against the background of some 20 years with respect to the distribution of Ford parts, that along about 1965 you formed the plaintiff corporation; is that correct?

A Correct.

Q And you told us a little earlier today about how you spoke with the operator, the franchise manager of Central and you negotiated a contract; didn't you?

A Correct.

Q And this contract had in it a number of very explicit terms, didn't it?

A Yes.

Q I show you a document that has been marked

Defendant's Exhibit O for identification and ask you if that is a copy of the contract that you negotiated with Central back in 1965?

A Yes, it is.

MR. MAC CRATE: I offer it in evidence.

MR. JULIEN: No objection.

THE COURT: It is received.

(Defendant's Exhibit O received in evidence.)

Q You knew at that time that Central was a franchised dealer of Ford having a code number assigned to it by Ford, did you not?

A Yes, I did.

Q And that you knew that a code number was for the purpose of registering transactions?

A By registering, you mean billing of all sales of parts to Ford?

Q Isn't that what it says here, for the purpose of registering transactions? And you also knew that Central had credit arrangements with Ford?

A Yes.

Q And it was also established that FLM had no code number, was not a franchise dealer and had no credit arrangements with Ford?

A Correct.

Q You knew that Central was unwilling to negotiate this agreement unless they were given some very specific assurances, didn't you?

A Yes.

Q And they were going to request, and doesn't it say right in paragraph 1, that Central will request Ford to issue to it a new and separate code number?

A Yes.

Q Doesn't it further provide that the invoice shall be forwarded to Central which in turn will bill FIM therefore at the invoice cost price plus two percent?

A Are you reading from the contract? I haven't read the contract since 1965.

Q I would like you to examine the contract and see if it doesn't provide that the invoices are to be forwarded to Central which shall in turn bill FIM.

THE COURT: If the contract says it, it says it. It is in evidence.

Q The rate at that time was two percent, was it not

A It was.

Q That was the invoiced cost price before discounts, allowances or credits and the two percent was computed on that?

A Two percent was computed on the dealer cost.

Q What was the arrangement that you negotiated at that time with respect to obsolescence credit?

A Obsolescence credits were to be on a 50-50 basis.

Q When?

A Central would take one, we would take the other as it became due.

Q Immediately?

A By immediately, you mean the day we went into business?

Q Look at paragraph 1. What is the meaning of the phrase,"that FLM shall have no part or portion of obsolescence credit until the beginning of the fourth year of the term of this agreement. Thereafter, FLM shall share to the extent of 50 percent." You are referring to four years later in 1969, are you not?

MR. JULIEN: There was a question without an answer, your Honor.

THE COURT: I guess we are just talking about the terms of the contract. If the contract says something, you can read it and it is in evidence.

A I would have to read the contract.

THE COURT: What does it say, Mr. MacCrate? Just tell us.

MR. MAC CRATE: "FLM shall have no part or portion

of the obsolescence credit until the beginning of the fourth year of the term of this agreement. FLM shall share as to the extent of 50 percent the share of such obsolescence credit but it shall not be or become a claim against Central. And shall only be credited to FLM when, as and if received."

Q You were familiar with the terms of that agreement in 1965, were you not?

A Yes, I was.

Q And the 50-50 provision with respect to obsolescence only came into force four years later in 1969?

A I believe we had a verbal contract prior to that.

Q You had a verbal contract amending this written agreement?

A We never did make use of it.

Q Were their various amendments to this written agreement of April 1965?

A There was an amendment later.

Q Can you tell us when it was first amended?

A I don't think it was amended in writing. It was amended as to the escrow account.

Q In other words, Central required that you put up some security?

A Correct.

Q And required FLM to put up some $15,000 of

security, did it not?

A Right.

Q And there came a time when that aspect of the agreement was amended?

A It was.

Q When in time was that, can you help fix that for us?

A I really would be guessing, but I believe it was '67. I am guessing because I do not know the correct date.

Q When there was this first amendment with respect to the security given, were you at that time operating with or without the use of a second parts code of Central?

A We would be operating without.

Q Was the requirement of security further amended thereafter?

A No.

THE COURT: What was the first amendment?

THE COURT: The first amendment was the return of the security.

Q And the elimination of all security?

A The elimination of the security.

Q Central required you to give an undertaking with respect to not using the name of Central; didn't they?

MR. JULIEN: I think there we ought to depend upon

the language of the agreement rather than the witness' interpretation.

MR. MAC CRATE: I would like the Court to be aware of this provision.

THE COURT: Anything you want to call my attention to, you can.

MR. MAC CRATE: I am in paragraph 4, "Except insofar as any purchases may be made by FLM under the code number of Central and only to that extent FLM shall not in any manner, shape or form use the name of Central in any of its advertising business or other activities or refer in any way or manner to any claimed association with Central," and I would also like to invite your Honor's attention to a further provision of paragraph 4, skipping a few words, "That is it not intended that any partnership, joint venture or other business relationship is being created other than a creditor-debtor relationship."

Q Did Central, in fact, back in 1965 seek a second code?

A I believe they did but I do not know the circumstances back in 1965. We arrived at an understanding at a second code which would make it easier to handle the account.

Q Didn't it say in this first paragraph that Central was going to try to get a code?

MR. JULIEN: Objection.

Q Don't you know that Central tried to get a code--

MR. JULIEN: I have no objection to the second question. I do object to the first.

THE COURT: Overruled.

Q Don't you know that Central tried to get a code and it was turned down as being against company policy?

A I could not swear to it at this moment that they did try in '64. I know we had agreed to try for a code in '65. I do not literally know that in '65 they had pursued it to the point of where they had been turned down.

Q Despite the undertaking at the beginning of the agreement that Central would seek a second code card, and despite the fact that no second code card was issued until 1968, you say that you have no idea whether Central at that time sought and was turned down?

MR. JULIEN: That question is bad in form, if your Honor pleases.

THE COURT: Sustained.

Q What is your best recollection as to what happened with respect to the first application by Central for a secondary code number?

A My recollection now of it would be very dim, it has been so long since I thought of the first application.

I don't even know if the first application was made in '68 and I don't really understand or know the circumstances that it was turned down.

Q No one ever told you anything about that?

A I would say I would assume I had a phone call which said we couldn't get your code number at this moment, something along those lines.

Q When this question was breached in 1968 about getting a secondary parts code number, were you told about it then?

A Yes.

Q By whom were you told at that time?

A By Mr. Kramer.

Q Did Mr. Kramer tell you that he thought he could arrange it now?

A He said he would try again to arrange a code number.

When you say arrange, I would think a better word would be to secure a code number.

Q Did he make any reference at that time to anticipating some difficulty in this respect?

A No.

Q Mr. McKee, have you ever sought the use of a second parts code number from any other Ford franchise dealer?

A I have asked other dealers, yes.

Q Could you identify, for us, who those other dealers were?

A Parkview Lincoln-Mercury.

Q When did you make that request to Parkview?

A I was approached by Parkview Lincoln-Mercury to sell me parts, so I said I would entertain the idea provided a parts code was available in the year of 1970.

Q Do you have any recollection of an earlier discussion with Parkview in relation to the possibility of their obtaining a secondary parts code?

A I don't recollect it.

Q I show you Exhibit AY for identification and ask you if that refreshes your recollection with respect to the time that you had a discussion with Parkview regarding the possibility of their obtaining a secondary parts code?

MR. JULIEN: If your Honor pleases, I wish to call to your Honor's attention that there appears to have been a withholding of some of the exhibits which counsel has known all about which he has neither marked nor shown to his opponent before and this is one of them.

THE COURT: Let's not even discuss it.

MR. MAC CRATE: It was already marked as AS-1.

THE COURT: Does it refresh your memory?

THE WITNESS: Yes.

THE COURT: In what way?

THE WITNESS: That Parkview had approached me earlier than I had realized. They approached me in December of '68.

Q Who was it that approached you in December of 1968 on behalf of Parkview?

A Mr. Vogels.

Q What did you say to Mr. Vogels at that time?

A That we would entertain the idea of doing business provided a code number was made available.

Q Did he show you at or about the time the letter that he was proposing to submit to make such a request?

A Not that I can recollect.

Q After examining Defendant's Exhibit AX for identification, your recollection in that regard is not refreshed?

A I don't ever remember seeing a letter.

Q Did you ever authorize Mr. Vogels to seek a parts code number in the name of Parkview Lincoln-Mercury, Inc. Fi

A No.

MR. JULIEN: Is that exhibit going to be marked?

MR. MAC CRATE: It has come to my attention, your Honor, that in the group of documents marked yesterday as

AS-1, 2, 3, 4 and 5, this document was, in fact, included.

MR. JULIEN: This is the first copy I have. Is it going to be marked in evidence?

MR. MAC CRATE: I would offer it.

MR. JULIEN: No objection.

THE COURT: AY is received.

xx (Defendant's Exhibit AY received in evidence.)

Q Mr. McKee, would you tell us what was the value of having a second parts code number assigned to a dealer at your address?

A It insured that all shipments of parts would come to that address. In other words, any back order items or items shipped from other depots would come to the particular address as shown by the code number.

Q But it is possible to arrange for drop shipments, is it not?

A Yes, it is.

Q So that you could obtain the same service without a second parts code number?

A Not on the same basis.

Q When you say "not on the same basis," you are referring to the fact that you have to specifically request delivery if you don't have the second parts code number?

A When I said not on the same basis, I meant a slow-

down of the operation. The only way that I am aware a part is not in Teterboro is if I call an order ship or cancel in which I know the part is no longer in Teterboro. Therefore I have to request a drop shipment from whatever depot is available.

Q So the second parts code number permits you to get information with respect to particular shipments, is that what you mean?

A It allows me to know or anticipates the delay in the deliverying of a part.

Q What is the value of having more than one?

A The code number -- the value is that the part, if it has to come from another depot is designated on the packing slip, drawing from whatever the location may be. Now the part will automatically come to the address of the dealer code.

Q What would be the advantage to you at a time when you had already obtained a secondary parts code under the Central name to get a further secondary parts code number under the Parkview name?

A It would be an advantage to have everything in the same locality. As it was, we were in different localities and I believe we at that point may have been creating internal strife in the Ford Motor Company organization.

Q You were in Yonkers and Parkview was in Yonkers?

A Correct.

Q And Central was in Brooklyn?

A Right.

Q So you are saying you didn't want two secondary code numbers, but to cancel the one with Central and get one with Parkview?

A It would have facilitated our operation.

THE COURT: Because Parkview was in Yonkers?

THE WITNESS: Yes. Any problem which arose we could take care of them immediately.

Q When did Central under the arrangement you had with them first learn that you had bought parts under their name? How soon after your transaction would they know about it?

A They would know when they received the invoice which at that time I believe was -- I believe the invoices at that time were going out by the week.

Q Has that practice changed?

A Yes, that practice has changed. Now invoices go out within a matter of two days, I believe.

Q Back at that time, Central would have only found out about a week later what you had bought during the particular week?

A Right.

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Q And that they would have been able to determine by adding up all the invoices that came streaming in?

A Right.

Q How did Central know how much they owed you, or how much you owed Central at any one time?

MR. JULIEN: Was this before the separate code number or after?

Q After you had the second code number?

A Everything on the 13430 code related to FLM parts.

Q How did they know from day to day how much you owed them?

A As the invoices were received, we would photostat them and mail them directly to Brooklyn so they would be able to keep right up to date on what we were purchasing.

Q So the invoices didn't come in to Central in Brooklyn. They came in to you in Yonkers under the second code number?

A Correct.

Q And it was only after you gathered the invoices together and sent them over to Brooklyn, then Brooklyn knew what FLM had bought under the Central name?

A Correct.

Q And the collection of invoices for parts that were unpaid would accumulate over a period of days, would they not?

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A No, because at that time the invoices were basically coming in in one weeks purchases all in the one mailing.

Q How often did you pay Central?

A Central, we normally paid them sometimes in advance but we would have always paid them by the 20th of the month which is Ford's statement date. Ford has a cutoff date of the 20th, but by the 20th of the month, we would be completely paid, but there were occasions when we did pay in advance.

Q When you say "paid in advance," in advance of what?

A In advance of the statement being issued by Central to us.

Q The statement from Ford is dated the 25th of the month; is that correct?

A That is correct.

Q I don't understand what you are saying about your paying in advance.

You were sending a check over to Central before you had received the statement as of the 25th of the month from Ford?

A Correct. By totaling the invoices, we were aware how much we owed them at any given time.

Q And you did that once a month?

A We would do that to keep it from accumulating to such a point that it would be unbearable.

Q But it was a whole month's invoices you were totaling at that time?

A We would be totaling one week's invoices at any given time.

Q So far as your payment, you only paid once a month, didn't you?

A There were periods where we paid more than once a month, but our final payment would be by the 20th of the month.

Q You say there were periods when you paid more often than once a month. Can you identify for us those periods?

A It would be very hard..

MR. JULIEN: Your Honor, I cannot recall any defendant contention indicated in the stipulation which indicates that any part of their defense has to do with the payments inter sesse between my client and Central.

THE COURT: Your objection is on relevancy?

MR. JULIEN: Yes.

MR. MAC CRATE: Your Honor, this goes to the very heart of why a second parts code in this kind of a situation is a deception and a totally improper practice and confirms the soundness of the Ford policy. It also goes to point out

the credit risk that is borne by the dealer and the obligation that the dealer is assuming in doing business in this fashion, and we have a whole series of different turns upon which this particular kind of arrangement has been carried out from year to year.

There was an arrangement at the beginning. We had $15,000 of security given, and I want to follow down the development of this relationship and the relationship of the various dealers to show what are in truth its component parts.

MR. JULIEN: If your Honor pleases, in this case these defendants have never claimed that the termination of either the code or the allowances to my client were generated by any credits between them and Central. Central has never complained. How do they come in a position?

THE COURT: You do complain about the termination of the second code?

MR. JULIEN: Yes.

THE COURT: I think he has to go into the use of the second code.

MR. JULIEN: If he claims we were delinquent that is one thing, but he does not make that claim. There is no such statement that I recollect anywhere and, therefore, it is irrelevant to this case.

MR. MAC CRATE: I submit, your Honor, it goes to

the very heart of understanding Ford policy with respect to secondary parts codes and situations where they are improper and situations where they could be justified.

THE COURT: It is moving very slowly. I think we could somehow get the point without going at such a snail's pace.

I think that all of the methods of doing business is certainly relevant.

Can we just pick it up a little bit, Mr. MacCrate?

Q Did there come a time, Mr. McKee, when you went to a surety company to get a bond to give to Central to secure your account with them?

A Yes.

Q Do you recall when that was?

A I don't really recall. Possibly '67, '69, somewhere in there.

Q I show you Defendant's Exhibit AZ for identification and ask you if that refreshes your recollection?

MR. JULIEN: This is another exhibit that has never been shown to us.

THE COURT: Let's not get into that.

Q Does that refresh your recollection, Mr. McKee?

A It does.

Q What do you recall as to the time when an

application was made for security?

A I don't really recall anything particular about it at that period.

Q What do you recall about an application for security for Central?

A I believe at that time we wished to extend our credit further with Central. I think our original agreement allowed us to purchase $20,000 worth of parts, but now we were purchasing more than the original 20,000. I believe that was the reason we did apply for this.

Q This is an application -- I will ask you to identify the document.

A It is an application to the Aetna Casualty and Surety Company, Hartford, Connecticut. Application for bond license permit, miscellaneous.

Q And it is an application for a bond in what amount.

A $40,000.

Q And it is dated when?

A September 10, 1971.

MR. MAC CRATE: I offer in evidence the bond application.

MR. JULIEN: Did you ever take this bond out?

THE WITNESS: No.

MR. JULIEN: Did Central Lincoln ever receive any

bond from you?

THE WITNESS: No.

MR. JULIEN: I object to it as immaterial.

THE COURT: Overruled.

xx (Defendant's Exhibit AZ received in evidence.)

Q Do I understand that you were asked by Central to increase the security that you gave them when the amount of your accumulating obligations exceeded $20,000?

MR. JULIEN: I don't think that is the answer. That is a rephrasing.

THE COURT: Let's have the answer. If it is the wrong summary, the witness can say so.

Did Central ask you?

THE WITNESS: I do not recall if Central did actually ask us for such a thing. I don't really recall.

Q AZ bears your signature, does it not, on the second page?

A Correct.

Q And you did prepare this application. Then what happened to it?

A I believe we just dropped it at that period. We never did go any further with it.

Q Do you remember anything of the circumstances in which you signed that document, AZ?

A I don't really.

THE COURT: Have you taken his deposition?

MR. MAC CRATE: No, we have not.

THE COURT: You are doing a deposition. Shall we adjourn the trial while you complete discovery?

MR. MAC CRATE: Your Honor, there is a strange coincidence of dates that I want to get to.

THE COURT: Let's get to it.

Q This application for a bond was in September 1971, wasn't it?

A Yes.

Q When did you first learn that the Ford policy with respect to the wholesale incentive had been changed?

A In November of 1972.

Q And despite your knowledge of Ford policies and practices, the first you ever heard that a wholesale incentive was not due on sales to a wholesaler, was in November of 19[illegible]

A Right.

Q And it is your testimony that this application for security for Central in September of 1971 had absolutely nothing to do with the change of policy of Ford in July of 1971?

A Correct.

Q From whom did you first learn that there had been

a change in Ford policy in July of 1971?

A From Mr. Pollack of Atlas Lincoln-Mercury.

Q Did you have a master price list for Ford parts and accessories in your premises in Yonkers back in the period 1971, 1972?

A Yes.

Q Have you continued since that time to have a copy of the parts and accessories price list in your premises in Yonkers?

A Yes.

Q I show you what has been marked as Defendant's Exhibit H for identification and ask you if that is a copy of the price list as of April 1974?

A It is.

Q That was the type of price list that you have had at all times at your premises in Yonkers?

A When you use the word "type," I say, yes.

Q It has been amended from time to time and new pages are provided, is that what you are referring to, and a new back, perhaps, when one gets worn out?

A It has been amended as to pages being removed as well as additional pages.

Q So that from time to time old pages are taken out and replacement pages are put in?

A Correct.

Q And you are familiar with the fact that in the front of the price list, there is a section entitled "General Information"

A Yes.

Q Back in 1971 in that section there was a description, was there not, of the various discounts and allowances that were available with respect to parts?

A I would agree to that, yes.

MR. MAC CRATE: I would like to offer in evidence at this time Exhibit H for identification.

MR. JULIEN: No objection.

THE COURT: What is the purpose of the offer? Does it show that the change in terms of the wholesale incentive was reflected in an amendment to this document published at or about July of 1971 or something like that?

MR. MAC CRATE: I am prepared to put those particular pages in evidence, your Honor, but I thought it was a convenient time to mark the volume because there will be occasion to refer to particular portions of it.

THE COURT: Proceed.

xx (Defendant's Exhibit H received in evidence.)

MR. JULIEN: If counsel is about to embark on a new subject, would you give some consideration to what I told

you in the robing room?

THE COURT: What time do you need to leave?

MR. JULIEN: I have a 4:30 appointment.

MR. MAC CRATE: It is not a new subject.

MR. JULIEN: If he is in the middle of something, I prefer he finishes that subject.

THE COURT: All right.

Q I show you Plaintiff's 8 in evidence and ask you to look at the third and fourth pages of Plaintiff's Exhibit 8.

THE COURT: Has 8 been received?

MR. MAC CRATE: I withdraw that. I have been led to believe that it was in evidence.

I think, your Honor, that being the case, I don't have the easy mechanical step that I thought I did have.

THE COURT: We will adjourn until 10 o'clock tomorrow.

(Adjournment taken until September 25, 1974 at 10 o'clock a.m.)

WITNESS INDEX

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Stephen McKee	120	190		

EXHIBIT INDEX

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FLM COLLISION PARTS, INC.,

Plaintiff,

against

73 Civil 713

FORD MOTOR CO. and FORD MARKETING CORPORATION,

Defendants.

New York, N. Y.

September 25, 1974 - 10:00 a.m.

(Trial continued.)

THE COURT: I always feel apologetic to everyone if I get irritable, and I have been for the past couple of days, but what concerns me was, there was a meeting Friday at which we went over a very extensive stipulation in which there was outlined the contentions of fact by the two sides that had not been stipulated.

Now, it seems to me that the whole purpose of going through that exercise is obviously to eliminate the need for testimony on items stipulated and to have testimony only on the issues of fact raised by the contentions of the two sides that are not stipulated.

One obvious omission from that whole document was the subject of damages, but on liability, it seems to me, that document should have been the guide for the trial. It

does not seem to me it has been, and I, frankly, have experienced some frustration, which I am sorry for, but so be it.

It seems to me we have had a lot of evidence taken on items which were stipulated, and it seems to me that we have had evidence taken and issues raised which were not embraced in the contentions outlined by the parties.

I don't understand why this is true. There was ample opportunity for both sides to fully understand and clarify the issues in the case. The issues werr really laid out pretty well by the motion for a preliminary injunction. There was no mystery, really, as to what FLM was claiming. The basic problem was presented then and is presented now, and that is, can Ford make the kind of conditions about wholesale allowances that they made in the policy that they announced as of July 1, 1971? That is the overriding issue in the case.

There are other issues raised by the plaintiff's contentions and the defendants' contentions, but basically I chink this is an issue of law.

Certainly, there was a good deal of very specific information about what the plaintiff is specifically claiming which was brought out in a motion for preliminary injunction. Following that, both sides had the opportunity to address interrogatories each to the other side, take depositions and

ask for a clarification and a narrowing of contentions in the case that was a mystery. If there were any last-minute problems raised by new counsel for the plaintiff and wrongness of witnesses that was alluded to yesterday, that is something that should have been brought to my attention.

Friday I thought we were coming to trial on a very efficient basis, and I thought -- and I still think -- that the case deserves no more than three trial days. I see no reason for having to go over these three days, and I see no reason to have to go into Monday, but I have given you Monday, and I will tell you, this case will finish Monday. You can go into any kind of detail, but the case will finish Monday.

MR. MacCRATE: With all due respect, your Honor, I must say this has been one of the most unusual cases in which I have been involved. What has come about here in the last few days before trial is just an uncommon experience for me.

THE COURT: No objection was ever raised to me. I was available Friday, and I just cannot have -- because I will really rebut that point by point if you make any more of this, Mr. MacCrate, and it is what I was trying to address myself to in a fairly gentle way now, but I don't want to be critical of counsel, and I don't really feel it, but I am concerned about the need for me to proceed in something

approaching an efficient manner, and if there were problems raised by last-minute maneuvers of any kind by the new lawyers for the plaintiff or confusing list of witnesses or confusing list of documents or any of that kind of thing, I was available, and I could have heard objections on Friday. We were together for a fair amount of time, and I could have dealt with it; I could have arranged to get together and clarify the issues to the extent necessary, whatever.

But I did not believe I was starting a trial where the issues were not crystallized, and the whole purpose of having the exercise of stipulating and laying out the unstipulated contentions was to crystallize the issues, and it makes a lot of difference in going to a trial where the issues are crystallized and where they aren't.

If the issues are not crystallized, people can introduce evidence on anything at all, and nobody knows whether it is relevant or not. I did not believe we were coming to trial on that basis.

I was not apprised of a problem in advance of Monday morning. I was given to believe that a satisfactory stipulation and list of disputed contentions was arrived at as of Friday afternoon, and I assisted in having that get done, and I don't want to get into a battle with anybody in this courtroom, but I don't understand it any other way,

and the only thing we can do now is to go forward as of Wednesday morning. But I am saying to you that I would hope -- and I am going to do everything within my power -- that we can keep this trial within the limits of that pre-trial order, and there are lots of things that are being gone into that are beyond that pre-trial order, and I will try to keep the evidence within it.

MR. MacCRATE: Your Honor, in a letter to the Court on the 13th of September I attempted to lay out the problem with respect to witnesses. The letter was a communication, it is true, to plaintiff's counsel, but at that time I sent a copy to the Court to alert your Honor to the kind of problem we were encountering, and we made every effort over the ensuing week to do all that was humanly possible on the part of counsel to prepare the thing.

The first response we had to stipulating facts, as your Honor is aware, was the Thursday before trial, and we were before you that Friday with that difficulty that emerged after our conference of Thursday, when counsel wanted to withdraw from part of the stipulation that was made.

THE COURT: The only difficulty I was told about on Friday was the attempt by plaintiff's counsel to withdraw from the stipulation on some nine points. I was told of no

other problems still existing as of Friday.

MR. MacCRATE: But we hoped we were resolving it. On Sunday we still were waiting for the exhibit list. On Sunday afternoon, at four o'clock, the afternoon before the trial begins, we obtained a copy of the exhibit list. There were 101 documents on that list.

What has now ensued on the trial is in no way a reflection of that exhibit list.

THE COURT: I would not expect, Mr. MacCrate, if I got an exhibit list on Sunday afternoon, the Sunday before the trial, that I would be expected to meet every single, last factual point raised in 101 exhibits. I would not expect it. I would expect that the case would be going to trial on the pretrial order which had been signed and stipulated to the previous Friday, and that would be that.

So all I am saying is, and I am just repeating myself, but I don't really understand why there is this problem, and I really feel that the issues are better crystallized than we have somehow demonstrated in the last two days.

Let's go forward and finish your cross-examination of Mr. McKee.

I have gone over in the last few minutes the pre-trial order, and the issues to me, except for damages, are

very well laid out in that pre-trial order, and I am going to expect the parties to stick to that, and if you want to refresh your memory at a recess, perhaps it would be a good idea for the lawyers to go over that pre-trial order and let's stick to it.

MR. MacCRATE: With all due respect, I did not know until Monday afternoon, after the trial commenced, that the plaintiff was going to have a truncated case instead of the eleven witnesses that they had identified to me, and I had no way of indicating that until Monday afternoon.

THE COURT: Okay. Let's just go forward.

S T E P H E N M c K E E , resumed.

CROSS-EXAMINATION (Continued)

BY MR. MacCRATE:

Q Mr. McKee, you spoke of a Mr. Collura helping to sort out papers in 1968. Where did that sorting out take place?

A In Brooklyn.

Q This was at the offices of Central in Brooklyn?

A Yes.

Q There was great confusion over the transactions between FLM and Central; is that the fact?

A There was not great confusion. There was some confusion.

Q And it was necessary to bring in someone else to help out the people at Central?

A Yes.

Q While you operated with the secondary parts code of Central, how did Central know that you were not reselling the parts to other dealers?

A They did not know.

Q Did they know as to any particular sales to whom you did sell?

A No. We had never advised them of such.

Q Did Mr. Kramer relly know anything more than you chose to tell him about what you were doing with Ford parts at that time?

A He knew that the parts we were purchasing were for sale to auto body shops.

Q On which sales were the wholesale incentive claims made: on sales by Central to FLM or on sales by FLM to its customers?

A On sales from FLM to its customers.

Q At that point, you were really masquerading as a franchise dealer, were you not?

MR. JULIEN: Objected to.

THE COURT: Sustained.

Q You were using the name of Central for your busi-

ness?

MR. JULIEN: I object to that. These are matters covered in the stipulation of facts.

THE COURT: They are amply covered by the specification. This is an argumentative question. The objection is sustained.

Q On the books of Central, was there any reflection of sales to FLM?

A I have never seen Central Lincoln-Mercury's books, so I couldn't answer you.

Q On what could they have made -- on what basis could they have made an entry in their books? Do you know?

MR. JULIEN: Objection.

THE COURT: Sustained.

Q After the secondary parts code was canceled, effective January 1, 1971, on which sales were wholesale incentives claimed: on sales by Central to FLM or on sales by FLM to its customers?

A From Central to FLM.

Q So a whole new accounting scheme had to be devised between you and Central at that point, did it not?

A I don't really fully understand the question.

Q The incentive claims before were on sales made by FLM to its customers; is that correct?

A That is correct.

Q But after the cancellation of the second code, the incentive claims were based upon sales from Central to FLM; is that right?

A Right.

Q Two different types of sales were involved: before the code was canceled and after the code was canceled; is that right?

A Correct.

Q There was a great deal of new accounting arrangements that had to be worked out at that time, was there not?

A There were some accounting arrangements, but not a great deal.

Q You said yesterday that the value of a second code was simply the convenience of paper, did you not?

A It did relieve the dealership of a paper problem.

Q Wasn't there a lot more to it than that? Didn't this really put FLM into the shoes of a franchise dealer?

A It allowed the parts to be shipped directly to the FLM address.

Q And the invoice came to the FLM address?

A Yes.

Q The bills came there?

A Yes.

Q And Central only knew about the transaction to the extent that you passed information to Central?

MR. JULIEN: Objected to.

THE COURT: Sustained.

Mr. Julien, I didn't understand you were making a separate, independent anti-trust claim because of the failure of Ford to give the second code number to FLM or for sales to FLM.

Again, I am going to go back to the pre-trial order. I don't see anything in the pre-trial order at all about any contention based upon the failure to permit a second code number.

MR. JULIEN: The introduction of that material, sir, only shows knowledge on the part of Ford that we were a wholesale customer and, consequently, this indicates that we are an indirect customer of Ford with respect to the Robinson-Patman Act violations.

THE COURT: In other words, your argument about the second code is about, let's call it circumstantial evidence of what you claim are substantive violations of anti-trust laws?

MR. JULIEN: Yes.

THE COURT: But you are not saying -- and maybe this is a fine distinction -- but you are not saying it was

in and of itself a violation of the Sherman Act or the Robinson-Patman Act to withdraw the second code, are you?

MR. JULIEN: I am saying, once having granted it, it would be a violation.

THE COURT: What is there in the anti-trust laws that forces Ford to allow to Central a second code number for sales to FLM?

MR. JULIEN: It is this: Since Ford, it is true, may elect who its customers may be, perhaps, once having recognized that we are a substantial wholesaler, by withdrawing that code it makes it the more difficult for my client to secure the necessary crash parts for its business.

This in itself is an obstacle to distribution.

THE COURT: All right. Go ahead.

BY MR. MacCRATE: (Continuing)

Q I show you Exhibit AXand ask you, in addition to that type of statement sent to Central, what other information did you send to Central with respect to your business with the Central code number in July of 1969?

A This would be the only information I would send them.

Q Mr. McKee, I show you a copy of Plaintiff's Exhibit 104, about which you testified yesterday. Does the date on that check refresh your recollection as to

when you had a conversation with Mr. DiAngelo about moving your location from Yonkers to Mount Vernon?

A Yes. It would be in this time period.

THE COURT: What is that?

THE WITNESS: The date on this is 5/8/70.

Q Did Mr. DiAngelo in his conversation with you at that time call your attention to the fact that the secondary parts code issued to Central was under study and being questioned?

A Not that I recall.

Q You don't recall anything of that type?

A I don't recall. He may have done so, but I do not recall it.

Q You testified that for many years you retained in your office a Ford price list; is that correct?

A Correct.

Q And you have attempted at all times to keep it up to date?

A Correct.

A I ask you if Defendants' Exhibit AH for identification was among the pages that you received for insertion in your parts manual on or about a date in late June or early July of 1971.

A I would say yes.

MR. MacCRATE: I offer AH in evidence.

THE COURT: Any objection?

MR. JULIEN: No objection.

(Defendants' Exhibit AH for identification was received in evidence.)

THE COURT: Does this have the change, Mr. MacCrate, about the incentive allowance?

MR. MacCRATE: Yes; it does, your Honor.

THE COURT: Can you point that out to me?

MR. MacCRATE: The changes, your Honor, appear on the page that bears "25" in the lower right hand corner, and they are marked with a square, which is a control, and we will stipulate that that will not be on a copy received by a customer.

MR. JULIEN: I don't understand that.

MR. MacCRATE: Before I offer that stipulation, I better confirm when this marking was put on.

The marking on the second page, your Honor, is something that was added to the exhibit in the course of preparation.

THE COURT: You mean the handwritten indication to direct my attention?

MR. MacCRATE: Yes. There is a box that goes around the change.

THE COURT: The printing was all in the sheet as distributed to the customer.

MR. MacCRATE: That is correct.

THE COURT: And the witness said he received all this.

Under "Ineligible Sales", I guess this means ineligible for the wholesale incentive discount, sales to any customer not engaged in automotive or repair work, except for export agencies.

All right.

MR. JULIEN: In that other box under "Ineligible Sales", that, too, is something which has since been inserted. It was not printed that way.

MR. MacCRATE: The box was not, but it also indicates a change in the June 30, 1971 revision.

THE COURT: I think it is obvious. The lining around the printing was not in, but the printing was in.

MR. JULIEN: Would it be helpful, if your Honor pleases, if we had the companion piece which existed prior to this change?

THE COURT: You mean you want to offer it?

MR. JULIEN: I would like to see it.

THE COURT: Ask Mr. MacCrate, but let's go on.

Q Mr. McKee, I show you Defendants' Exhibit L for

identification and ask you if you can identify that document for us.

A This is a pad known as the WINS, or the Wholesale Incentive claim paid, to be used for March 1974 claims.

Q The WINS system was introduced on an optional basis at an earlier time, was it not, before 1974?

A To be honest, the WINS system -- I really don't remember when it was put into operation.

THE COURT: What is the exhibit number you are looking at?

THE WITNESS: Exhibit L.

THE COURT: What is it?

THE WITNESS: It is a pad of wholesale incentive claim pad.

THE COURT: What is the date of the form?

THE WITNESS: March/April 1974 claims.

Q Is that the type of form that is presently used for claiming incentives?

A I cannot answer it. I do not have the current forms.

Q I show you the printed list of part items which are a part of the overall form headed Wholesale Incentive Claim Form and ask you if a form similar to that was not prepared by you or under your supervision prior to November of 1972.

A Yes.

MR. MacCRATE: I ask that the page I have just shown the witness be marked L-1 for identification. It is the very first page of the listing of parts, and I would offer that page in evidence. I don't believe I have laid a proper foundation for the rest of the document.

MR. JULIEN: No objection.

(Defendants' Exhibit L-1 received in evidence.)

THE COURT: Let me see it.

I don't understand the significance.

(To the witness:) You are saying a form of this type, this exhibit, was used by you before November 1972?

THE WITNESS: In that area, yes. In that time period.

THE COURT: What does it do? Does it list a lot of part numbers?

THE WITNESS: It lists a lot of part numbers -- In that particular one, I think it lists the incentives for the given part.

THE COURT: In terms of incentives or in terms of the dollar figure?

THE WITNESS: In terms of the dollar figure.

THE COURT: What are you supposed to enter on this?

THE WITNESS: You enter in this one, I believe, the

quantity sold; you enter the invoice number to your customer. If you had a Ford dealer emergency, it would be entered here. A major fleet -- incentives claimed on a major fleet or Government sales and shop sales are listed separately.

THE COURT: You are supposed to specify whether this was a regular wholesale account, namely, an account of a repair shop, something like that?

THE WITNESS: Right.

THE COURT: Or whether it was a sale to a major fleet, like a Govenment unit?

THE WITNESS: Yes.

THE COURT: Or whether it was to a Ford dealer in an emergency; right?

THE WITNESS: Yes.

THE COURT: There is a column which has at the top "Shop Wholesale". What is that?

THE WITNESS: Items used in the shop, used to repair an eligible customer's vehicle, used in the Ford dealer's shop.

THE COURT: You would not get an incentive discount on that, would you?

THE WITNESS: If the customer was eligible for discount.

THE COURT: What kind of customer would be eligible

for discount or the sales to many eligible -- I don't understand. What do you mean?

THE WITNESS: A small fleet would be eligible. Anyone with more than six Ford vehicles would be eligible for a shop discount if it was repaired in his own shop, as compared to selling the part to the fleet for use in the fleet owner's shop.

THE COURT: In other words, if you were the franchise dealer, if you sold a part to, say, the General Services Administration, then that sale would be eligible for the incentive discount; right?

THE WITNESS: Yes.

THE COURT: Suppose that GSA brought the car in, and you made the repair in your shop, you being the franchise dealer: would it be eligible for a discount?

THE WITNESS: It would then become a shop wholesale.

THE COURT: And it would be eligible for discount?

THE WITNESS: Yes.

THE COURT: What is the significance of introducing this form, Mr. MacCrate?

MR. Mac CRATE: I want to distinguish between the type of form that your Honor saw yesterday -- and I hand to the Court Defendants' Exhibit AV as a sample -- and to

distinguish the type of form that was mandated and used prior to January 1, 1972, with the form that was introduced on an optional basis January 1, 1972.

This is an aspect of the control problem that I was speaking about in explanation to your Honor yesterday.

THE COURT: What does it show? What are you trying to show from the distinction between the two forms?

MR. MacCRATE: There is an entirely different character of information that is now provided for, and that whole pad is sent to the claimant to prepare with every part number identified, and it is all an attempt to control erroneous claiming.

THE COURT: In other words, the old form, illustrated by AV, didn't specifically ask whether the customer was a Ford dealer or a body shop or a fleet or who. It didn't ask any of that kind of information; right?

MR. MacCRATE: That is correct, your Honor.

THE COURT: And the new form, as we have discussed, asks all that information, and, as you say, it is intended to implement this kind of control.

All right.

BY MR. MacCRATE: (Continued)

Q This change in the form of claiming came to your attention at the beginning of 1972, did it not?

A That is correct.

Q And, in fact, a certain confusion arose because you were right up to date as to the requirements, but Central was not, and you prepared your claim on the new forms and Central prepared their papers for their own internal sales of parts on the old form?

MR. JULIEN: I have to object to that question in that form. It contains statements of fact.

THE COURT: If the statements of fact are correct, he can say so.

A I have no means of ascertaining what forms Central Lincoln-Mercury was using to collect incentives.

Q I show you Defendants' Exhibit BA for identification and ask you if that does not refresh your recollection.

MR. JULIEN: This is not on your exhibit list?

MR. MacCRATE: I am not sure how far the exhibit list runs. This is a document I had for cross-examination. The letter is from Central Lincoln-Mercury to Autolite Ford Division; therefore I have no copy of such a letter.

They state a confusion. The fact --

THE COURT: Don't read the letter. It is not in evidence.

(To the witness:) Do you have any knowledge of the subject matter of that letter?

THE WITNESS: It refreshes my memory to the fact I had a phone call regarding why we had used this particular pad.

Q And you explained that it was the new form?

A That this was the pad that had arrived at our premises.

Q And this was due to the fact that so long as you had the second code number available to you, communications went to the address shown with that code number?

A Correct.

THE COURT: What is the date of that letter?

MR. JULIEN: January 31, 1972, your Honor.

I don't understand that question. It conflicts with the revocation of the code number. In 1972 he didn't have the code number.

THE COURT: If you have an objec tion as to relevancy, why don't you make the objection? If you don't, you can reserve and ask questions on redirect.

I don't understand what difference it makes about whether he was up to date on the forms in January of 1972 and whether there was some confusion. All of this completely escapes me as far as the issues in the case are concerned.

MR. MacCRATE: One of the aspects of this, your Honor, is the close attention that FLM paid to changes in

Ford procedure.

MR. JULIEN: That is not an issue in this case.

MR. MacCRATE: The question of knowledge of the change in policy in July of 1971 and the continuance of a claim of incentive at a time --

THE COURT: I don't think that makes the slightest bit of difference.

You have put in evidence the page amending the price manual, and the witness has admitted he got that page. I will assume he either knew or had notice of that change the minute it was made, and I will further assume that despite that knowledge or notice he kept on trying to get the wholesale incentive allowance.

I don't think it makes the slightest bit of difference. It is a matter of whether he was in fact cut off in November or July. The real issue in this case is whether the cut-off was valid and whether he knew about it in July of '71 or November of '72, and how does it relate to antitrust?

Are you saying he comes into court with unclean hands or something?

MR. MacCRATE: Your Honor, the whole difficulty that you have in properly policing and enforcing a price structure such as is involved here is one of the matters we

are trying to lay before the Court so it can be understood.

THE COURT: You improved your form. Ford was concerned about what they term the policing, so they improved their form, and I will assume there was a problem in ascertaining the facts about whom the franchise dealers were selling to and what kind of accounts.

I don't think, again, it has anything to do with this case. Ford knew -- at least, some elements of the Ford organization knew -- as early as 1969 that Central was selling to FLM and FLM was in turn selling to body shops. That, I think, is well established.

Some elements of the Ford organization may not have known. I don't think that the anti-trust claim hinges on that in the slightest degree.

Ford ultimately did two things: they revoked the second code, and they changed the policy on incentive discounts, and, after that, maybe it took a little time for the knowledge of that change to percolate to all the necessary people. I just say, so what?

MR. MacCRATE: I will not dwell further on it, your Honor. I will possibly advert to it in briefing.

THE COURT: All right.

BY MR. MacCRATE: (Continuing)

Q Mr. McKee, were any of the changes in your

your contractual arrangements with Central put in writing?

A Not as I recall.

Q Is there any correspondence on the subject?

A I couldn't recall at this moment.

Q Was it all just word of mouth?

A Mostly it was on a gentlemen's agreement, word of mouth, verbal, usually by telephone.

Q And the increase from two per cent to three per cent, to which you referred yesterday, in the amount that you would pay above the dealer net: that was a change?

A That was agreed verbally.

Q When you learned that Central was selling out, what steps did you take to continue your arrangement with Atlas?

A I didn't change in any manner. I had a letter from the principal of Central Lincoln-Mercury saying as of a certain date he would no longer be the principal, but the new, incoming company, Atlas Lincoln-Mercury, would continue to do business on the same basis.

Q Did you go and talk to the new Atlas man?

A No.

Q You didn't have any conversations with the man who took over at Atlas?

A At a later date, yes.

Q How soon did you have any conversations with the man

at Atlas?

A I couldn't recall how soon, but I know it was later than receiving the letter from Mr. Gordon.

Q Do you recall the date of the transfer from Central, Mr. Gordon, to Atlas, Mr. Pollack?

A I believe the letter was July 14th.

Q How long after July 14th did you speak with Mr. Pollac k about this arrangement?

A I do not recall how long.

Q Would it be within the next week?

A It would have been relatively within the next few weeks. It wouldn't have run into months.

THE COURT: And you are saying that the letter advising you that Central was selling to Atlas, that Atlas would continue to do business on the same basis, was July of 1972?

THE WITNESS: July 14, 1972.

THE COURT: And you talked to Mr. Pollack of Atlas some time later?

THE WITNESS: Yes.

Q Did you explain to Mr. Pollack how the paper work was handled?

A I don't think we entered into any discussion. We at that time decided to continue on the same basis.

Q Mr. McKee, I show you Defendants' Exhibit BC for identification and ask you if you can identify for his Honor that document.

A That was a document which listed all of the parts sold by Central Lincoln-Mercury, but at that time, at the date here, it would have been changed to Atlas Lincoln-Mercury. All of the parts sold to us which would be eligible under the wholesale incentive discount arrangement.

Q What is the date on the top page?

A 8/28/72.

Q August 28, 1972. And on the second page?

A August 30, 1972.

Q And on the third page?

A September 1, 1972.

Q And on the fourth page?

A Also September 1, 1972.

Q And on the fifth page?

A September 11, 1972.

Q And on the sixth page?

A This is out of rotation. It is Septemb er 7, 1972.

Q The next page?

A September 15, 1972.

Q And the last page?

A September 18, 1972.

Q Do you know where those papers were prepared?

A These were prepared at FLM Collision Parts.

MR. MacCRATE: I offer them in evidence.

THE COURT: Any objection?

MR. JULIEN: No objection.

(Defendants' Exhibit BC for identification was received in evidence.)

THE COURT: What was the purpose of this document?

THE WITNESS: This was to enable Atlas Lincoln-Mercury at that point to ascertain that the actual parts sold to FLM were listed in the price books as eligible for incentives.

THE COURT: Central and Atlas had the price books?

THE WITNESS: Yes.

THE COURT: You were just making a summary?

THE WITNESS: Yes.

Q Would it be correct, Mr. McKee, that Exhibit BC, which has just been received in evidence, was the form used after the cancellation of the second code, and Exhibit AX was the form used by FLM prior to the cancellation of the second code?

A That would be correct.

THE COURT: Can I see AX?

Is BC a kind of transaction-by-transaction listing?

THE WITNESS: Transaction from Atlas Lincoln-Mercury to FLM Collision Parts.

THE COURT: What do the entries mean?

MR. JULIEN: Which one is your Honor showing? BC?

THE WITNESS: This is the actual parts sold through the customer.

THE COURT: Is there an indication of the sale to the customer by invoice number or date?

THE WITNESS: This is the invoice.

THE COURT: Over on the left you have listed the particular invoice, the quantity and the part number.

THE WITNESS: And the incentive.

THE COURT: There are a couple of columns, one labeled OP and one labeled OM.

THE WITNESS: At that time, the price book did show what was printed, and it had these notations alongside.

THE COURT: What do they mean?

THE WITNESS: I never understood the significance of them.

THE COURT: What were the amounts in those two columns? In the first entry of 262 under the heading OM, what is that?

THE WITNESS: That is the incentive on that part.

THE COURT: Meaning $2.62. Then under the heading

1047?

THE WITNESS: This is an accumulation from another page.

THE COURT: This is a running balance of some kind?

THE WITNESS: A running balance.

THE COURT: It doesn't look like that, frankly, but in the third item, under the total, you have 396, whereas the entry above it is 3461. That can't be a running total, can it?

THE WITNESS: I cannot testify as to that. I don't remember what it means.

THE COURT: In other words, you are saying to me that this for a certain period of time -- is this something you prepared daily?

THE WITNESS: Yes.

THE COURT: So it is a list of the daily transactions which you were claiming the incentive allowance on?

THE WITNESS: Yes. I believe this may be the actual cost price of the part in the right column.

BY MR. MacCRATE: (Continuing)

Q Mr. McKee, is the form which has been marked Exhibit BC the invoice representing sales from Central to FLM at that time?

A Yes.

Q And that invoice of such sales was prepared for Central by FLM?

A The invoice? I don't really understand your question.

Q BC was prepared by FLM, was it not?

A Yes.

Q Then it was sent to Central?

A Yes.

Q In the case --

THE COURT: BC is August and September. Central wasn't even in existence.

MR. MacCRATE: I was speaking in terms of the form.

Q This was the practice that had been followed. Did you understand my question?

A Yes.

Q After Atlas succeeded Central, did you explain that you would prepare for Mr. Pollack of Atlas the invoice of the sale from Central to FLM?

MR. JULIEN: Just a moment. Are you treating this as an invoice?

Q Is there any other document that reflects a sale from Central to FLM?

A No.

Q This is the invoice?

A Okay. We will class it as an invoice.

Q Did you explain this procedure to Mr. Pollack?

A Yes.

Q Did you tell him that you would write up these forms with Central Lincoln-Mercury on them, "Sold to FLM Collision" and send them over to him?

A I would not know if it was Mr. Pollack this was discussed with. It may have been his assistant, who at that time was Mr. Kramer, or possibly with his parts manager.

Q But you did have such a discussion as to how this was to be handled?

A Yes.

Q When you learned that Atlas was being threatened with a charge-back for wholesale incentive on sales to FLM, did you owe money to Atlas?

MR. JULIEN: I object to the question.

THE COURT: Sustained.

Q Didn't you receive some information in the course of October 1972 about a threatened charge-back to Central for erroneous wholesale incentive claims?

A Threatened charge-back to Central?

Q To Central.

A There was a discussion as to a charge-back, yes.

Q At the time of that discussion -- Was it in October

of 1972?

A It would be, yes.

Q At the time of that discussion, did you owe a substantial amount of money to Atlas?

MR. JULIEN: I think the sequence is a little hard to follow.

THE COURT: The objection is overruled.

A Could you restate the question? Did I owe a substantial amount of money to whom?

Q To Atlas.

A Yes.

MR. JULIEN: Is this a new document on the exhibit list?

MR. MacCRATE: It is a part of one of the documents.

MR. JULIEN: Can you tell me which one, so we can find it?

Q I show you Defendants' Exhibit BB for identification and ask you if you can identify that letter.

A Yes; I can identify it.

Q What is it?

A It is a letter from FLM Collision Parts, dated October 30, 1972, putting a demand on the Atlas Lincoln-Mercury Company for the incentives owing for August, September and October of 1972 and also for credit due on return of parts.

Q And you signed this letter?

A Yes; I did.

MR. MacCRATE: May I offer the document in evidence?

MR. JULIEN: No objection.

(Defendants' Exhibit BB for identification was received in evidence.)

THE COURT: I don't understand what this exhibit has to do with the case.

MR. MacCRATE: It relates, your Honor, to testimony on direct examination from this witness, and I will be happy to tell you.

THE COURT: What testimony does it relate to?

Q Did you write that letter at or about the time of your conversation with Mr. Pollack, to which you testified yesterday?

A I don't really understand the question.

Q Yesterday, you recall, you testified about a conversation that you had with Mr. Pollack.

A Yes. It would be in that general time.

THE COURT: So? Does it rebut his testimony or supplement it?

MR. MacCRATE: It supplements his testimony on that point.

THE COURT: In what way?

MR. MacCRATE: It shows that there was an account oweing from FLM to Atlas, that Atlas was having held up the claims for incentives, that Mr. McKee was saying, "I am going to claim those incentives on my balance, and you are just not going to get paid."

This is the essence of this communication, and it relates directly to just what was the business situation between Atlas and FLM at that time.

MR. JULIEN: If your Honor pleases, counsel has written in a great deal more than this says.

THE COURT: I was trying to follow this.

All right. I understand what it says.

Q The incentive claims that were not being honored at that time included those that are reflected in Defendants' Exhibit BC, did they not?

A Yes; they would.

THE COURT: The missing link in my mind on this point -- and obviously it is an important point -- is to determine whether Atlas terminated its sales to FLM because of a direction from Ford or whether it terminated because of its own business problems with FLM; right? I mean, that is the issue, isn't it?

MR. MacCRATE: That was an issue that was presented

yesterday in testimony to which I objected.

THE COURT: We have a stipulation that after July 1, 1971, FMC continued to give credits for wholesale incentive allowance to Central and Atlas for sales to FLM until November 1, 1972, but did not give such credits thereafter.

That is Paragraph 26. So we have the November 1, 1972 date, as brought out in the stipulation.

Then we have the defendants' contentions 15 and so forth, which states that FMC's responsible personnel did not realize until October '72 that Central and Atlas were continuing to claim credits for wholesale incentive allowance for resales which they were not entitled to have or claim.

I have not heard any testimony about any build-up of a problem, or I haven't heard any testimony about the background for this Exhibit BB in the October 31st letter, which you say indicates a business problem and a controversy about some amounts owed by FLM to Atlas and problems about whether Atlas should give him an incentive discount.

I have not heard any testimony about a background.

MR. MacCRATE: Your Honor, I am in the position of being on my cross-examination of the second witness in the plaintiff's case.

THE COURT: Let me just ask:

(To the witness:) Prior to this October 31st letter, had there been some discussions between you and Mr. Pollack or between you and Ford about your indebtedness to Atlas and problems about incentive discounts?

THE WITNESS: There were no complaints whatsoever as to our credit rating. In fact, we enjoyed an excellent credit rating.

THE COURT: I am not asking you about credit ratings. I am asking you about any amounts you owed and any problem about the incentive discounts.

THE WITNESS: There were discounts -- discussions about the incentive still not being allowed by Ford Motor Company.

THE COURT: They were before October of 1972?

THE WITNESS: Yes.

THE COURT: When would they have started?

THE WITNESS: I would say September. The discussion was in a general matter as to the credit still not been issued by Ford Motor Company.

THE COURT: Who told you that?

THE WITNESS: Mr. Pollack, apparently.

THE COURT: What did he tell you?

THE WITNESS: That these credits had been under study and had not been issued.

I should clarify that. These claims were under study, not credits.

THE COURT: Did you then hold up or say you would hold up moneys that you would otherwise pay to Atlas?

THE WITNESS: No. We still continued paying the regular statement but not any claims we had made for incentives.

THE COURT: So you just deducted the amount you thought you were entitled to under the incentive discount?

THE WITNESS: Yes.

THE COURT: And the obsolescent return discount?

THE WITNESS: Yes, your Honor.

THE COURT: Otherwise, you kept on paying?

THE WITNESS: Correct.

THE COURT: So the controversy was whether you would have to pay him the amounts involved in the incentive and obsolescence credits when he was not at that time being allowed those things from Ford?

THE WITNESS: That is right.

THE COURT: Did Pollack tell you that the claims about obsolescent credits were also being studied by Ford?

THE WITNESS: That was not discussed. That obsolescence credit was not discussed at any time.

THE COURT: That was not a problem?

THE WITNESS: That was not a problem.

THE COURT: The main problem was the incentive?

THE WITNESS: Right.

THE COURT: Go ahead.

BY MR. MacCRATE: (Continuing)

Q You had discussions with Thomas in October of 1972, did you not?

A By "Thomas", you are referring to Thomas Motors, Inc, a franchised Ford dealer.

Q And the operator of Thomas Motors is Mr. Baldassare.

A Mr. Baldassare, correct.

Q And you had conversations with him?

A Yes.

Q In your conversations with Mr. Baldassare, did you propose a particular type of arrangement under which you would buy parts from Thomas?

A Yes. I proposed to purchase parts from him, the same as I had been under the Atlas account.

Q What percentage were you proposing?

A At that time, I was proposing less than I was paying to Central. I proposed two and a half per cent.

Q So it wasn't the same terms?

A It was not exactly the same terms.

Q Following those discussions, what was the percentage that was ultimately agreed upon?

MR. JULIEN: I object to the question.

MR. MacCRATE: Withdrawn.

Q Did you reach an agreement with Mr. Baldassare in October/November 1972?

A We reached an agreement after we had been cut off by Atlas Lincoln-Mercury.

Q When you say, after you had been cut off, you mean when you had received word that they would not sell more parts to you?

A Correct.

Q In the case of your arrangement with Thomas, was any of that in writing?

A At that point, discussions were orally, after we made the agreement to actually purchase through Thomas Motors. I don't really know if we ever had a formal contract . I would have to be refreshed on it. There was an agreement that we would be allowed to purchase parts through their code number.

Q I have requested your counsel to produce any such agreements, and I have not seen them to this time, Mr. McKee. If any come to your attention, I trust you will bring them to the attention of counsel.

Did you, at or about the same time, enter into an arrangement with another Ford franchise dealer?

A Yes.

Q Which dealer was that?

A Parkview Lincoln-Mercury.

Q On what terms did you arrange to do business with Parkview?

A On the exact same terms as stated by Thomas.

Q Would you state for us just what were those terms?

A Those terms were five per cent over dealer cost.

Q With respect to what payment?

A Payment we were asked to pay on a weekly basis.

Q What was the agreement?

A The agreement was where possible we would advance them money on a weekly basis.

Q Was there any credit limitation placed on the account?

A Not that I am aware of.

Q How were the papers to be prepared? By whom? By Thomas or by FLM with respect to the transaction?

A The payment from FLM to Thomas?

Q Yes.

A Papers were to be prepared by Thomas.

Q So this also differed from your arrangement with

Atlas and Central, did it not?

A Correct.

Q In your direct testimony, you referred at various times to weekly payments, thirty-day and payments in advance. Could you identify for us what you mean by those three things, how they differ?

A On a thirty-day payment, we would pay on receipt of statement, which normally arrives in our place around the 16th to the 19th of the month on a thirty-day payment. We would pay on the receipt of the statement.

On a weekly, we would estimate our purchases for the week at a rough guess, not without checking actual figures; we would estimate our purchase was forty thousand this month, in which case we would then issue a check in the balance of from eight to ten thousand dollars.

Your third question was --

Q Then you referred to payment in advance.

A Payment in advance on a thirty-day account was allowed to accumulate to such an extent where it would become like a $48,000 check be withdrawn from our account at that time. We would issue a check, which we felt appropriate at that time to relieve us of the burden of one large check.

THE COURT: These are three types of payments that you used or thought of or what?

THE WITNESS: Three types of payments we actually did use.

THE COURT: At various times?

THE WITNESS: Yes.

THE COURT: One is called a thirty-day payment?

THE WITNESS: That is when we used the 13430 code.

THE COURT: And then you would pay the invoice when it came in from Ford?

THE WITNESS: Yes.

THE COURT: And that was a monthly statement?

THE WITNESS: Right.

THE COURT: The second type was what?

THE WITNESS: I believe I said it was the weekly.

THE COURT: Whom did you use that with?

THE WITNESS: Mostly I believe with Thomas Motors. There may have been cases where we used it with Parkview Lincoln-Mercury, but now I believe the question was Thomas Motors.

THE COURT: In other words, you would just try to estimate the monthly -- estimate what would be coming in in the way of a bill by the end of the month?

THE WITNESS: This was a request from the dealer.

THE COURT: But you would do that? You would try to estimate what would be due for a particular week, even

though you didn't have the formal statement?

THE WITNESS: Yes.

THE COURT: Wouldn't you know what you would owe for the week? You would have these daily summaries, wouldn't you?

THE WITNESS: It would be quite a job to list each individual part we sold or purchased.

THE COURT: So you would make it on a rough estimate; is that right?

THE WITNESS: Yes.

THE COURT: Payment in advance. What is the difference between that and weekly payment?

THE WITNESS: That is when we we decided we were going to end up with a monthly account, which we would have forty-two, forty-six thousand dollars coming out of our bank account at one time. Then we would issue a check in an amount which we felt would be appropriate to relieve us of the burden of such a large check at one time.

THE COURT: This would be at some time you would decide?

THE WITNESS: Some time within the thirty days.

THE COURT: When did you use that?

THE WITNESS: I used it with Central Lincoln-Mercury. I used it with Atlas.

THE COURT: For a part of what you expected to pay?

THE WITNESS: Yes.

THE COURT: I don't think we have in the record what happened. We had reference a couple of times to your relationship with Thomas. I think you testified yesterday that the day after you were turned down by Atlas or that same day you went to Thomas and placed the order that Atlas could not effect?

THE WITNESS: Correct.

THE COURT: That was in November of 1972?

THE WITNESS: Yes.

THE COURT: Did you thereafter deal with Thomas?

THE WITNESS: Yes.

THE COURT: For how long?

THE WITNESS: I believe June of '73. I could be off by one month.

THE COURT: Did you stop dealing with Thomas in June of 1973?

THE WITNESS: Yes.

THE COURT: What were the circumstances of your stopping?

THE WITNESS: The circumstances was that the dealer principal had been replaced, and the new dealer principal decided to terminate our account.

THE COURT: What was the name of the new dealer principal?

THE WITNESS: Mr. Fivson.

THE COURT: Were there discussions?

THE WITNESS: Prior to the cut-off?

THE COURT: I won't get into that.

He decided to terminate?

THE WITNESS: Right.

THE COURT: You mentioned Parkview. Did you deal with Parkview?

THE WITNESS: Yes.

THE COURT: On what day did you deal with Parkview?

THE WITNESS: The same day as I started dealing with Thomas, or the next day, give or take one or two days.

THE COURT: Did you continue to deal with Parkview?

THE WITNESS: Yes.

THE COURT: For how long?

THE WITNESS: We still deal with them, but on a lesser basis.

THE COURT: So that has never been terminated?

THE WITNESS: No.

THE COURT: When did you start dealing with Pleasantville?

THE WITNESS: It would be in 1973. I expect June

of '73.

THE COURT: And you still deal with them?

THE WITNESS: I still deal with them.

BY MR. MacCRATE: (Continuing)

Q Mr. McKee, his Honor has referred to your arrangements with Pleasantville. Would you describe the terms of your arrangement with Pleasantville?

A The terms with Pleasantville are identical to what we had with Thomas. In other words, cost plus five per cent. But the obsolescence credits to be allowed on a fifty per cent basis. Billing to be on a monthly basis and, where possible, payments to be made on a weekly basis. I say "where possible". Within allowing me to make the decision whether I should pay X number of dollars per week.

Q Is any portion of that arrangement in writing?

A The actual, literal agreement, I don't believe it is in writing. All I have, I believe, is an agreement to allow me to pick up parts at Ford Motor Company and purchase parts on their code number.

Q But you have an agreement with Pleasantville to that effect?

A Correct.

MR. MacCRATE: I would like to ask --

MR. JULIEN: Does he say that is a written agree-

ment?

THE WITNESS: I don't believe we have an actual written agreement.

Q But you say you did have, as I understood you, a written agreement with respect to your being permitted to pick up parts?

A Yes.

Q And to use their code number?

A Yes.

Q And that is in writing?

A Yes.

MR. JULIEN: That is something you gave to us, so you must have it.

THE COURT: Let's have a recess. Maybe you can straighten it out.

(Recess.)

MR. MacCRATE: If your Honor please, I would like to note in the record at this time that I received at 11:48 this morning an addendum to plaintiff's proposed assessment of damages, and it includes a reference to books of account through September 30, 1974, or an estimate thereof.

The only information that has been provided to defendants of which I am at the moment aware is through September 30, 1973, and I see us being confronted with the

problem, and I wanted immediately to note that, so there is no misunderstanding.

In that context, your Honor, in view of the fact I may have spoken rather strongly at the outset today, I would like to point out that on the transcript of March 11th, when the trial time was being discussed, your Honor, after listening to us about what would be involved, said, "Well, could we try the whole thing in a week?" I said I believed we could, and at that point the plaintiff was speaking of a two-day case, and I thought that the balance of the case could be completed in three, and I don't think we are too far off, but the notion of concluding it on Monday raises very serious problems for me.

THE COURT: Let's try to conclude it on Monday.

MR. JULIEN: I would like your Honor to have this addendum to our previous statement of damages, which includes one item not treated there with respect to loss of prospective profits.

MR. MacCRATE: Your Honor, I note in the document that Mr. Julien has just handed up to the Court there is a purported actual figure, I would assume, to September 20, 1974.

MR. JULIEN: We are affording them some opportunity in advance to know what the auditor is going to testify to.

They are asking for it, and we have done so. As soon as I have had it, I passed it on to them.

MR. MacCRATE: Who will be called as the auditor?

MR. JULIEN: Mr. Wasster, who is the accountant.

MR. MacCRATE: And also counsel of record?

MR. JULIEN: Yes.

MR. MacCRATE: And he will appear as a witness in this cause?

MR. JULIEN: He is the accountant for the firm.

THE COURT: Let's go ahead with your cross-examination, Mr. MacCrate.

BY MR. MacCRATE: (Continuing)

Q Mr. McKee, during the recess have you had an opportunity to discuss with your counsel any agreements in writing or any evidence of agreement in writing between you and Pleasantville, between FLM and Pleasantville?

A Yes; I have.

Q Were you able to locate any such agreements?

MR. JULIEN: This is all we have: a letter dated July 19, 1973.

MR. MacCRATE: The question was directed to the witness.

A We have one letter from Pleasant ville Ford, authorizing us to order and pick up parts at Ford Motor

Company.

Q Is it your testimony that there is no other document that in any way reflects your arrangements between FLM and Pleasantville?

A Yes; that is correct.

Q All the rest is just a verbal understanding?

A Yes.

Q With respect to that verbal understanding, does it include assisting Pleasantville with respect to its own parts operation?

A IN a verbal understanding, that would be with the parts manager of Pleasantville Ford, in which case we would assist in the pick-up of their parts.

Q What charge to you make for that service to Pleasantville?

A None whatsoever.

Q Do you render any other services to Pleasantville of that kind?

A Nothing of that kind.

Q Do you render any other services to Pleasantville of any kind?

A I assist them if they have difficulty in locating a part number or a problem, actually a technical problem.

Q Do you receive any compensation from them for

such assistance?

A None.

Q I show you Defendants' Exhibit BD for identification and ask you if you can identify that document.

A Yes; I can.

Q What is it?

A This is a letter from FLM Collision Parts. I do not have a name who it is to on it, but it is to any guard who may stop my truck coming in, because at this particular time the driver who normally picks up for me was ill; therefore I did not have the pick-up card, or my driver did not have the pick-up card. So you need an authorization to get in or out of Teterboro.

Q How did you sign this document?

A I signed it for Pleasantville Ford.

MR. MacCRATE: I offer the document in evidence.

MR. JULIEN: No objection.

(Defendants' Exhibit BD for identification was received in evidence.)

MR. JULIEN: Do you intend to offer the other document?

MR. MacCRATE: I just have a copy of the same document.

MR. JULIEN: I am talking about the letter of

authorization.

THE COURT: He didn't offer it, and he didn't mark it. It is up to you if you want to do so.

Let's go ahead.

May I see Exhibit BD for a minute, please.

Q Mr. McKee, how do you arrive at the price at which you sell crash parts to a body shop today?

A I arrive at the price from the Ford price manual. In other words, using their suggested list price.

Q What is the computation that you make?

A I make a computation of list price less twenty-five per cent.

Q So that in his Honor's example yesterday of a $10 suggested list price, that would be a price of $7.50?

A Correct.

Q Does the Ford price list also show a column called general trade price?

A Yes; it does.

Q Do you know what that is?

A General trade price is also dealer cost.

Q Is it a suggested price to the general trade?

A No; I would not construe it as such.

Q How does it differ from the dealer price?

A It differs in the fact that an item in that column

would also have wholesale incentive.

THE COURT: I don't understand.

There is a column in the Ford price list, General Trade Price. What is that?

THE WITNESS: General Trade Price is actually dealer cost without any incentive removed therefrom.

THE COURT: Discounted; right?

THE WITNESS: Discounted.

THE COURT: Is that the forty per cent off, or forty-two?

THE WITNESS: That is the forty per cent off.

Q When did that column, General Trade Price, first appear in the Ford price list, if you can recall?

A I couldn't really recall.

Q Hasn't it been there since the time of the wholesale incentive being instituted?

A I would suspect that is when it was instituted.

Q It is, in effect, a suggested price to body shops?

A It is the suggested price, but one not normally used in the trade.

Q But it is there with that intent to reflect a suggested price to body shops?

MR. JULIEN: I have to object to that. How can he say what the intent is?

THE COURT: What is his understanding? He has a good deal of knowledge.

Your question is, does he understand it to be a suggested price to be charged to body shops?

MR. MacCRATE: Yes.

A Yes; it would be a suggested price to a knowledgeable wholesale account.

THE COURT: I don't understand you saying that it is not usually used. I thought you told me that in your case you counted on buying the $10 part, for instance, for six dollars, and I assume this was standard.

THE WITNESS: The column to which he refers in the price book at this moment would be the dealer cost or the cost which I buy at plus five per cent.

THE COURT: Taking my $10 illustration, the $10 is the Ford suggested retail price; right?

THE WITNESS: Right.

THE COURT: If you are a dealer or someone buying from a dealer, if you are a body shop buying from a dealer, you would expect to get forty per cent off of that?

THE WITNESS: No. That is not the actual expectation.

THE COURT: You do in your business, don't you?

THE WITNESS: I get forty per cent plus five.

THE COURT: Forty per cent. Then the dealer charges you five per cent of net what remains; is that right?

THE WITNESS: Yes.

THE COURT: If you are a body shop, what are the body shops paying these dealers as a general thing?

THE WITNESS: They are paying list less, or retail less twenty-five per cent.

THE COURT: So in general the body shops are paying more than you are paying?

THE WITNESS: Right.

THE COURT: Before we get into an illustration, let me see if I am clear.

Let's go back to the days when you were dealing with Central, then Atlas. The Ford price list had this figure, General Trade Price; right?

THE WITNESS: Yes. It would be there.

THE COURT: At least after the wholesale incentive came along.

That General Trade Price listed in the Ford book was suggested retail price less forty per cent?

THE WITNESS: Yes.

THE COURT: While you were buying from Central and then from Atlas, you paid the suggested retail price less

forty per cent.

THE WITNESS: Correct.

THE COURT: And a five per cent added on to --

THE WITNESS: At that time three per cent.

THE COURT: We have been through all of this.

Generally, you are paying the general trade price plus three per cent of that?

THE WITNESS: Yes.

THE COURT: Then we went through how you would get the wholesale incentive.

THE WITNESS: Yes.

THE COURT: In your arrangements with Thomas and Parkview and Pleasantville, do you still pay the general trade price or did you still pay the general trade price plus the five per cent?

THE WITNESS: Yes.

THE COURT: Let's take the normal body shop, who is going into the franchised dealers in this area and buying. Are you aware of what they generally are paying?

THE WITNESS: Generally, they are paying twenty-five per cent off list.

THE COURT: Off the suggested retail?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. MacCRATE: (Continuing)

Q Mr. McKee, in his Honor's example, your selling price would be $7.50; is that correct?

A That is correct.

Q And the suggested general trade price is six dollars?

A That is right.

Q The dealer price is also six dollars?

A Six dollars without any incentives removed.

Q Yesterday you indicated that possibly half of your purchases of parts on written orders, which might then be put on stock order forms for a particular day in each week

When you made thatestimate, was that based upon any study you had done?

A That was based on prior knowledge of using the 13430 code, where we had wholesale discounts.

Q Did you make your computation and run totals and make a determination that I could look at today?

A No; it was actually based on an estimate.

Q So it was just something you made up in your head?

A It was an estimation.

Q Is the same thing true so far as this sixteen per cent figure is concerned, when you were talking about the wholesale incentive and that only being on certain incentive-

bearing parts and not on other parts, and you had to take the twenty-five per cent and weigh it with the non-incentive parts, and you came out with a sixteen per cent figure?

Do you have any paper that I could look at today that could indicate how you arrived at that figure?

A Yes. That is an actual fact that we have arrived at.

Q Would those materials be made available here in court?

A Yes.

MR. JULIEN: I will object to that. This is a matter, I think, to take up with counsel.

THE COURT: It is a matter which should have been taken up in discovery. We are starting discovery. This is like a deposition of this man. I just don't understand this. There have been months when you could have asked for documents, analyzed the documents.

MR. MacCRATE: Your Honor --

THE COURT: When you talk about meeting after Monday, I sit here and all I can think of is, we don't even need three days.

I don't understand what we are getting at. Once in a while we co me to a fact that needs to be adduced in testimony at a trial, and most of this is discovery or

irrelevant.

If you want to take a deposition of this man at the noon hour or tonight and ask him about documents, you can do it, but I will not have discovery going on in the courtroom.

MR. MacCRATE: I am confronted, your Honor with the fact that the claim for damages has only been articulated in the course of this week.

THE COURT: Why didn't you ask for it earlier, address the interrogatories to determine what their damage claim is? You knew this was a suit for damages.

I am going to ask you, if you want a deposition of this man tonight, you can take it; but we will not have a deposition in court.

If you want to ask about the existence of documents, you can address the request to counsel in writing. But let us not do it during the trial of this case here and now. Let us not have requests for documents.

MR. MacCRATE: Your Honor, I must point out there is not even a contention by plaintiff for damages.

MR. JULIEN: What is he talking about? It is only when these documents were presented in the course of this trial that we had anything.

THE COURT: I was the one who asked for them. I

don't recall you asking for them.

MR. MacCRATE: It is something where the burden reverts solely and exclusively on the plaintiff.

THE COURT: There is a claim for damages in the complaint.

MR. MacCRATE: Yes, your Honor; there is.

THE COURT: There is a prayer for relief.

MR. MacCRATE: So far as a contention, an indication of what would be contended for at this trial is concerned, plaintiff is not prepared to make it this past week.

MR. JULIEN: What kind of talk is that, your Honor?

THE COURT: I am now saying I will not permit discovery about documents. You can take a deposition tonight. Let's restrict the trial testimony to items that are appropriate for the trial, and if you want discovery, you can get it some other way.

BY MR. MacCRATE: (Continuing)

Q I show you Exhibit 103 and ask you if there has not been a piece of paper laid over another paper in making the xerox copy that was received in evidence as Exhibit 103.

A To the best of my knowledge, there has been nothing laid across this. This is the actual photostat copy given to me or received by me from Ford Motor Company.

Q Over in the right hand top corner there is a

notation of Charlotteville or Charlesville. I can't make it out.

A Charlotte.

Q And it says "Ship to FLM Collision Parts".

Is that information contained on the customer request for credit or Return Form 340?

A This shipped to -- no, that would not be on that form.

Q And that has been placed on top of the form when this copy was made, which has been marked in evidence?

MR. JULIEN: Are you asking whether that was?

A This copy was not initiated by me. This copy was made by Ford Motor Company from their records.

THE COURT: What did you receive? Did you receive this?

THE WITNESS: The actual copy.

THE COURT: You did not receive an original?

THE WITNESS: No.

THE COURT: What is your question about this slip?

MR. MacCRATE: My question was whether that slip was a part of the form or something that is pasted over the form or in some other way affixed.

THE COURT: It is the slip from the xerox, which appears to have the heading "Ford Marketing". Would you know

if that was from the original form?

THE WITNESS: That was affixed afterwards to show that the shipment was made to FLM Collision Parts.

Q This is a request for a credit. It is not the issuance of a credit to FLM?

A This is not the actual copy, which does issue the credit. This is the request.

Q The code number that appears on that is the code number of Parkview Lincoln-Mercury, is it not?

A There are two different code numbers on this particular document.

Q One being 13392 and one being 13393; is that it?

A That is correct.

Q And one of them is in error?

A The 13393 is Parkview Lincoln-Mercury's code.

Q What is the 13392, if you know?

A I do not know.

Q So that this was not a credit to FLM that was involved here but a credit to a Ford dealer.

A It is an adjacent code to 13393, but the credit is issued to FLM at that point, or the claim was made for FLM.

Q Is 13392 a code number that has at any time been assigned to FLM?

A I have no such code number.

THE COURT: According to your understanding, who got the credit? Was it the fellow who had been billed in error, 13392?

THE WITNESS: 13393 would get the credit.

THE COURT: That is Parkview?

THE WITNESS: Parkview would get the credit.

THE COURT: What was the reason for the credit?

THE WITNESS: The credit was a shortage -- the claim actually was written by an employee of Ford Motor Company. In other words, where they have not been able to ascertain a part was shipped, their own traffic department would then issue a credit.

THE COURT: And this related to parts ordered by you?

THE WITNESS: Yes.

Q Is there any handwriting on the document that is yours?

A No.

Q Do you know whose handwriting appears, "FLM Collision Parts", in the center top of the document?

A No; I do not.

MR. MacCRATE: I have no further questions.

THE COURT: Any redirect?

MR. JULIEN: Yes, your Honor.

Your Honor, in view of the cross-examination, I now offer in evidence Exhibit 32 for identification.

THE COURT: Any objection?

MR. MacCRATE: My only objection, your Honor, is that there is attached a second document, and I want to confirm that it was part of the original.

MR. JULIEN: That is the way you gave it to us.

MR. MacCRATE: It may be there is a reference in the document to an Exhibit A -- Yes; I have now located it.

No objection at all.

THE COURT: Exhibit 32 is received.

(Plaintiff's Exhibit 32 for identification was received in evidence.)

MR. JULIEN: I think you ought to look at the second page first for sequence.

THE COURT: Do you have any redirect examination, Mr. Julien?

MR. JULIEN: I have some more documents.

Your Honor has already received in evidence as an exhibit the letter from FLM to Mr. Pollack of Atlas with respect to the incentive credit statement.

THE COURT: Why don't you just offer the exhibit?

MR. JULIEN: I want to offer the acc ompanying letter that accompanied that.

THE COURT: What exhibit?

MR. JULIEN: It would be 43 for identification.

THE COURT: Any objection?

MR. MacCRATE: No objection, your Honor.

THE COURT: It is received.

(Plaintiff's Exhibit 43 for identification was received in evidence.)

MR. JULIEN: I would like your Honor to look at the covering letter.

THE COURT: Let me see it.

MR. JULIEN: 39 and 38 for identification, in that order.

THE COURT: Any objections to 38 and 39?

MR. MacCRATE: No objection, your Honor.

THE COURT: Plaintiff's Exhibits 38 and 39 are rec eived.

(Plaintiff's Exhibits 38 and 39 for identification were received in evidence.)

MR. JULIEN: May this be marked for identification, please.

(Plaintiff's Exhibit 105 was marked for identification.)

MR. JULIEN: I offer 105.

MR. MacCRATE: No objection.

(Plaintiff's Exhibit 105 for identification was received in evidence.)

REDIRECT EXAMINATION

BY MR. JULIEN:

Q Mr. McKee, Exhibit 105 is the document you previously made reference to during cross-examination as the authorization from Pleasantville to pick up merchandise.

A Yes. That is it.

Q Exhibit BD, which you signed, authorizing Mr. Brunner to pick up a particular order on a particular day: was that written by you as part of or to carry out the policy of the July 19th authorization, Exhibit 105?

MR. MacCRATE: Objection. It is leading.

THE COURT: Overruled.

A The letter that I wrote to authorize my driver to pick up the parts was, as I interpreted this here, to allow me to order and pick up parts.

Q That is, you mean 105?

A Yes.

Q The General Trade Price column which you told us on or about as appearing in the price list: I am just a trifle confused about that.

Is that the same as the dealer cost? Is that column the same thing?

A General trade price?

Q Yes.

A I believe the column is headed Wholesale Price or Suggested Wholesale Price. General Sales Price is general price less an allowance from retail supplied by the dealer.

Q When you responded to counsel before, he asked you about two columns.

A Yes.

Q Can you show us in the price list where those columns are, just for an example?

A Suggested List Price, General Trade Price, Dealer Price.

THE COURT: The first column on the left is Suggested List Price. That is the suggested retail price?

THE WITNESS: Yes.

THE COURT: There is a column, General Trade Price, which we were talking about before, and almost none of the entries on the page is price listed at all.

THE WITNESS: A better example would be a page showing it.

THE COURT: Anyway, there is a General Trade Price column, a dealer price column, a wholesale incentive per piece column and a dealer's price less wholesale incentive. What is the difference between the general trade price and

the dealer price?

THE WITNESS: They are the same.

THE COURT: Why do they have two columns?

THE WITNESS: General trade price is a suggested price to sell to a customer if the incentive only is being retained in the dealership.

THE C OURT: I don't understand you.

THE WITNESS: In other words, the dealer is working without any mark-up whatsoever on his dealer price.

Q Well, to whom does the general trade price refer? What level of distribution does it refer to?

A The general trade price, as my knowledge of the business, is not used in the sale of Ford parts, that I am aware of, except to the Ford dealer by Ford Motor Company. In other words, he actually pays the general trade price or dealer price, which is identical.

Q So for use in your business, you arrive at your price employing the suggested list price with twenty-five per cent off that, which is what you charge to your customers; is that right?

A That is right.

Q The Dealer Price column reflects your cost plus the three or five per cent that you were paying as the occasion arose?

A That is correct.

THE COURT: In our terminology I think we had better ignore this term, general trade price. There aren't many entries in the price list on it, so we have to refer to what was charged --

Which is the term you generally use: general trade price or dealer price?

THE WITNESS: Dealer price.

THE COURT: We will talk about dealer price.

MR. JULIEN: I want to be sure I haven't misled the Court by selecting a page that just happens to be blank.

THE COURT: If you find anything else, you can come back to it.

Q You were asked questions about when Atlas took over from Central, and you had to explain the method of operation. Was there any change in the method of operation when Atlas took over?

A There was no change whatsoever.

Q Did Mr. Kramer of Central remain with Atlas for some period of time?

A For some period.

Q In what capacity?

A I believe it is still in the same capacity, as general manager. I would not know if his title had been

changed in any way.

Q Did you participate in sales to Government agencies?

A No.

Q Or fleets?

A No.

Q And this Ford price list suggested prices at each level of distribution; is that right? For all items?

A Yes.

Q You were also asked whether Central secured more information with respect to your customers and charged made to them other than what you submitted on AX. Do your books and records reflect who your customers were with respect to each of these invoices?

A Yes.

Q Do the numbers of the invoices correspond with the invoices maintained by you in the regular course of business?

A Yes.

Q Were they examined on these audits by the Ford Company?

THE COURT: We have had that fifty times. Don't you think I have any memory?

MR. JULIEN: Your Honor's memory is far better than mine. I don't repeat because I intend to irritate the Court. It is because I have forgotten.

Q The question asked about Mr. Collura separating Central's documents from yours: Was that during the period before the separate code had been assigned?

A Yes; it was.

Q And after that, that job of separation was no longer required?

A That is right.

MR. JULIEN: That is all.

RECROSS-EXAMINATION

BY MR. MacCRATE:

Q With respect to the change from Central to Atlas, you said you received a letter from Mr. Pollack at or about that time in July of 1972.

A No. I said Mr. Gordon.

Q Mr. Gordon wrote to you?

A Yes.

Q Do you recall the date of that letter?

A July 14th, I believe. I think that was the exact date.

MR. MacCRATE: We have been unable to locate the letter.

THE COURT: Why don't you make a request for it and let Mr. Julien say what he can do?

MR. MacCRATE: May I have the letter, please?

MR. JULIEN: We will make an effort to find it.

THE COURT: Anything further from Mr. McKee?

MR. JULIEN: No, your Honor.

THE COURT: Thank you, Mr. McKee.

(Witness excused.)

MR. JULIEN: Mr. Wasser.

D A V I D D . W A S S E R , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JULIEN:

Q Mr. Waser, you are an attorney and an accountant as well?

A Yes.

Q Are you a Certified Public Accountant?

A Yes.

Q And you have been for how long?

A Since 1941.

Q As an accountant, do you regularly audit the books of FLM Collision Parts, Inc.?

A Yes; I do.

Q And you have for how long?

A Since their inception, in April 1965.

Q Have you prepared, preliminary to your testimony

here both the proposed assessment of damages and the addendum to the assessment of damages which have been submitted to our opponents and the Court?

A Yes; I have.

Q Have you at any time made a study of the books and records of this concern to ascertain how much of its volume of Ford crash parts fell in the category of those parts as to which a wholesale incentive was granted this company?

A Yes.

Q How did you make that study?

A I took the actual incentive credits allowed to FLM and recorded that on the records of the company, in the general books of the company. We then made studies, my assistants and I, of the purchases of the company, the actual purchases, and we then ascertained, in our work sheets, the percentage that the incentive credits bore to the purchases. This percentage was sixteen per cent of the total purchases of FLM.

Q For how long a period was encompassed within that study to arrive at that percentage?

A Since the incentive credits started. As I recall, it was in 1968.

Q Down to --

A Down to the discontinuance of the credits.

Q Applying that percentage of sixteen per cent, since the discontinuance of the wholesale incentive allowance have you computed what sixteen per cent of purchases of Ford crash parts since the discontinuance would mean in the way of sixteen per cent for inventory allowance?

THE COURT: Sixteen per cent of what?

THE WITNESS: This is sixteen per cent of FLM's entire purchases for the year.

THE COURT: Sixteen per cent of what figure? The price that FLM paid or the price that FLM received?

THE WITNESS: The price that FLM paid. FLM's purchases.

Q What does sixteen per cent of the price that FLM has paid for crash parts of Ford since the discontinuance of the wholesale allowance down to whatever date you took -- What date did you take?

A I took September 20, 1974.

Q Down to that date, what would be the amount of incentive allowance which would have been received at sixteen per cent? What does that amount to?

MR. MacCRATE: Objection unless the beginning date is fixed.

THE COURT: Let's go into that in more detail. Objection sustained.

Q What date do you start with?

A November 1, 1972.

Q And you go down to September 20th?

A September 20, 1974.

Q And you take the total amounts paid for Ford crash parts during the period?

A I took the total purchases of FLM for that period.

Q First five us what that total was.

A $1,139,232.

Q Have you computed what sixteen per cent of that amount would be?

A Yes; I have.

THE COURT: Is he simply going to testify as to the calculation shown in this document of September 23rd, plaintiff's proposed assessment of damages? There is no use having him simply read figures that are in a document. This is his statement.

MR. JULIEN: Your Honor suggests that I offer the statement?

THE COURT: I think I would mark it for identification and see if we can't use it, to simply avoid him repeating what is in the document.

It looks to me as if it is in fairly good detail.

MR. MacCRATE: I believe we have a problem of the

best evidence rule here, that we are being given a number of conclusions without any documentary support.

THE COURT: Your only objection so far, in the last series of question, was to object because there wasn't a starting date given, so we have testimony as to Item 1-A on page 1 of the document of September 23, 1974, basically without objection.

What I was thinking of is this: if he was going to be permitted to simply testify on the other items without objection, subject to your cross-examination, let's have it come in in the form of a document.

MR. MacCRATE: I do indeed have an objection. I was surprised that Mr. Julien didn't enlarge upon his interrogation with respect to the item. I thought he was just laying a basis for further interrogation.

I move to strike the conclusory testimony of this witness.

MR. JULIEN: I don't know what that means. Accountants make conclusions from their examination of books. How else is it to be done? Do you want him to read each item in the book that goes into his computation and his conclusion? This is traditionally the way.

THE COURT: I would overrule the objection. He has testified that he made the calculation. Now, the cost

of parts sold on this document I have before me -- there is a statement that the cost of parts -- and he has clarified that in his testimony -- the cost of parts paid by FLM to dealers from -- I guess there is a typographic error. You mean from November 1, 1972?

MR. JULIEN: Yes.

THE COURT: To August 30, 1974, the million-dollar figure.

He has in this document an estimate for the period September 1st through September 20, 1974, $28,000, but I think he would be permitted certainly to testify that on the basis of his calculations he totaled the cost of parts sold, and he made an estimate of the cost for the small period at the end.

Why couldn't he testify to that?

MR. MacCRATE: I submit, your Honor, we have simply conclusory statements without any of the supporting documentation for them, and here is an estimate of $28,000 without any indication of how that estimate is arrived at.

THE COURT: Let's take the $1,111,000 figure. You can have all the documents, and you can cross-examine him.

MR. MacCRATE: We have a special problem here that this is a document signed by the witness as attorney for the

plaintiff.

MR. JULIEN: Why is that a special problem?

MR. MacCRATE: We now have the attorney called to the witness stand to testify in this conclusory manner.

THE COURT: What is conclusory about saying that he is an accountant and that as an accountant he has examined the books and records of FLM, and the books and records of FLM record the cost of parts purchased by FLM for the period in question, and the total comes to $1,111,232? What is conclusory about that? It is a statement of fact.

MR. MacCRATE: Is this a statement of counsel or is it a statement of an accountant? This is not an audited financial we are being given. It is a statement signed by Mr. Wasser as attorney for plaintiff.

THE COURT: Mr. MacCrate, he is sworn as a witness and as an accountant. I am using the document in a forlorn, vain stab of trying to shorten the trial.

If this document, whatever it is called, whether it is a blue paper, red paper, signed by whomever, if it is a statement of what this witness will testify to, we may be able to use it to short-cut his testimony, to prevent him from having the need of repeating what is in the document.

If he adopts it and says this document reflects

his calculations, then we may be able to use it. That is all I am saying.

MR. MacCRATE: Your Honor, the customary fashion for proving information of this sort with which I am familiar is by the ac countant coming with the books of account and testifying from them or, in lieu thereof, certified financial statements, and in the absence of certified financials, it is the books of account that are the basic evidence of the information sought to be introduced.

THE COURT: Your first statement was, you thought that the customary way of proving this kind of thing was to have the accountant testify from the books and records. That is what I thought you were doing.

THE WITNESS: I do have them here, your Honor.

MR. MacCRATE: With an indication of where in the books and records the particular information can be found. It is the only way there can be cross-examination of testimony of this character.

MR. JULIEN: I think that is a matter for cross-examination.

THE COURT: We can get that easily enough.

Why don't we take our luncheon adjournment now, and over lunch you gentlemen can look at these items and see in general where they come from. I don't think there is

any matter of great difficulty. There are obviously questions of law, whether they are entitled to get these things, but I assume there is a ledger or a book, and I am sure there are two or three books which show what FLM paid for the parts sold.

THE WITNESS: Yes; a summary.

THE COURT: How do you get into obsolescence credits? That is the next item in this document of September 23rd, isn't it?

THE WITNESS: This was a figure from the company's primary records. They keep records before the ledger, and this was an exact figure that the company had.

THE COURT: How do you calculate it? You have Parkview 19,452. How did you calculate that?

THE WITNESS: Mr. Steve McKee keeps this record, and this was on the company's premises.

THE COURT: What does it mean?

THE WITNESS: These are the obsolescence credits we would be eligible for if we were on the same basis as a Ford dealer.

THE COURT: How do you calculate it?

THE WITNESS: It is an actual calculation made by Mr. McKee, I believe.

THE COURT: You didn't make the calculation?

THE WITNESS: No; I checked it.

THE COURT: What did you do to check it?

THE WITNESS: I just saw the records kept at the company. There is a whole mass of original records.

THE COURT: What records did you see on the subject of the obsolescence credits denied with respect to Parkview?

THE WITNESS: These were the calculations that Mr. McKee --

THE COURT: What kind of calculations? Did he add, subtract, divide? Did he have separate items, part numbers or what? Are they here?

THE WITNESS: Your Honor, I didn't bring those figures.

THE COURT: This is a little harder. Any company records the cost of the goods they buy in whatever ledgers they are in, but when you come to obsolescence credits denied, that is a little different as far as I am concerned from reporting of things you pay for that you buy.

You really are not sure what records were used as the foundation for those calculations, are you?

THE WITNESS: I believe it is taken from primary statements. I did not want to take the time of the Court to bring all the invoices, but I believe the company has these

primary records of purchases that were eligible for the obsolescence credits.

MR. JULIEN: It is just a percentage.

THE COURT: Just a minute. I am asking the witness the question.

I still can't tell from you how these were calculated?

THE WITNESS: You have to ask Mr. McKee.

THE COURT: So this witness really can't testify about Item 1-B of the proposed assessment of damages.

Let's have this marked for identification, so we can talk about it.

(Plaintiff's Exhibit 106 was marked for identification.)

MR. JULIEN: Your Honor, I think I can show that he can if you give me just a moment on that, and the manner I intended to do that.

BY MR. JULIEN: (Continuing)

Q Did you take a percentage for obsolescence?

A Yes, based on the past history.

Q What percentage?

MR. MacCRATE: May we have marked for identification the documents that the witness is reading?

THE COURT: We are going to adjourn now. Over

lunch I am sure you are organized to do this quickly, but you go over and you show Mr. Julien and Mr. MacCrate the way you computed all of these figures that you have here, and then we will be in a position at 2:15 to know whether you can really testify to this or somebody else will have to testify to this.

THE WITNESS: Okay.

THE COURT: We will adjourn now.

(A luncheon recess was taken.)

- - -

A F T E R N O O N S E S S I O N

2:15 p.m.

MR. JULIEN: If your Honor please, prior to our adjournment in the morning session, counsel asked for the letter of July 14th, you recall.

THE COURT: Yes.

MR. JULIEN: It turns out to be July 15th of 1972, from Central Mercury to our client, in termination of business. I turn that over.

THE COURT: Did you make any progress on the accounting evidence?

MR. JULIEN: We have made, I think, some progress, but I do think, if your Honor please, that for purposes of the record, I should ask just a few questions of this witness

with respect to the exhibit which has been marked for identification.

THE COURT: Surely; yes.

Now, what progress have you made?

MR. JULIEN: Well, counsel has asked for some of the material which Mr. Wasser has examined in the course of preparing his computations which enter into this assessment of damage, and so far as possible he has been showing it to them and they have been examining it.

Now, whether that completes everything they want --

THE COURT: The point is, are we going to have to have him read a statement which is in a document?

MR. JULIEN: No.

THE COURT: Or are we going to be able to have a stipulation that if he testified he would testify to this effect? That is what should be done, and if there is any part of his testimony which really can't be admitted, or if he doesn't know the basis for it, I would assume you know that now, and you wouldn't offer his testimony on that.

MR. JULIEN: I know now that even with respect to the one item that he thought he did not have the information on, the record shows that he did.

THE COURT: Mr. MacCrate, are you prepared to stipulate that this witness would testify to the information

set forth in Plaintiff's Exhibit 106 for identification?

MR. MacCRATE: I am not so prepared, your Honor. I have not completed. We have been here since one-thirty, examining all that we could. We made requests; additional papers were brought out, and while Mr. Julien has apparently satisfied himself to a great extent, I have been waiting to get certain things, and I am in the process of examining.

THE COURT: Well, this would not preclude you from cross-examining, but it is just a question of if he were to continue to testify he would, I assume, testify to the information set forth in this document, subject, of course, to your cross-examination, and you don't feel that there is enough of a basis demonstrated to stipulate even to that; is that right?

MR. MacCRATE: Well, I gathered from some of the consulations and discussion there might actually be some revisions in some of the figures.

THE COURT: All right. Go ahead.

MR. JULIEN: May I make this suggestion on the basis of expediency, your Honor?

THE COURT: Yes.

MR. JULIEN: Suppose I conduct my direct examination, not asking him to repeat what is in the document but simply as to how and in what formula was adopted and how he

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procured the information.

THE COURT: All right.

D A V I D D . W A S S E R , resumed .

DIRECT EXAMINATION (Continued)

BY MR. JULIEN:

(Plaintiff's Exhibit 107 was marked for identification.)

MR. MacCRATE: This is the addendum?

MR. JULIEN: Yes.

Q Mr. Wasser, it take it that 107, the addendum, as well as 106, was also prepared by you?

A Yes.

Q Did you use the books of account of my client, FLM Collision Parts with respect to the preparation of all these matters?

A Yes.

Q Specifically, I want to take you back to a colloquy between yourself and his Honor on the subject of the obsolescence credits. Have you reviewed your own papers respecting the material you used to prepare B and 106, 1-B, that is, 1-B of 106, dealing with obsolescence credits?

THE COURT: Item 1-B of Exhibit 106?

MR. JULIEN: Yes.

A Yes.

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Q Would you tell his Honor now the method which you employed to arrive at the obsolescence credits which you listed in 106, 1-B?

A We took the actual purchases of FLM from the Ford dealers for the period November 1, 1972 to September 20, 1974 and multiplied that by five percent.

Q Was that something you did?

A Yes. The five percent was based upon past history of the obsolescence credits allowable.

Q There you applied it with respect to the purchases made from the three firms disclosed in that portion of 106?

A Yes.

THE COURT: Is there anything in the record now to indicate that the Ford Motor Company or Ford Marketing Corporation caused Parkview or Thomas Motors or Pleasantville to deny obsolescence credits?

MR. JULIEN: Yes, your Honor.

THE COURT: What is that?

MR. JULIEN: We have shown while we were doing business with Central, we did receive obsolescence credits and the plaintiff has himself testified, that his plaintiff's chairman has testified that once having left Central in negotiating his new arrangements with the subsequent dealers, he could not receive and did not receive the obsolescence

credits.

THE COURT: He testified that in negotiating with Parkview, Thomas Motors and Pleasantville, they, as part of their negotiated bargain refused to give him any of that kind of discount.

There is no evidence and there is nothing for me to infer from that that was attributable to Ford. I assume there would be an objection to evidence about obsolescence credits denied and I would sustain the objection.

MR. MAC CRATE: Your Honor, I would make the same objection to B, C, D and E, all as to relevance.

THE COURT: I do not want to move too fast, Mr. Julien, but my memory is in accord with what you have told me. The testimony of Mr. McKee is, in his dealings with Thomas, Pleasantville and Parkview, as a result of negotiations with them, he got none of these discounts. That is his testimony, is it not?

MR. JULIEN: Yes.

THE COURT: There is nothing in the record right now specifically attributing those denials to Ford, is there?

MR. JULIEN: I think, if your Honor pleases, he has also testified that he could not receive these obsolescence credits or other credits because he was not an eligible wholesaler and this, too, I think is the testimony --

THE COURT: I do not think he has to testified.

I will sustain the objection to that unless you point something to me.

MR. JULIEN: Would you do this, Judge. I am quite convinced there is sufficient testimony to draw that appropriate inference from. Would you take it and if it develops at the end of our case it is not present, you could strike it rather than to have to call him back? I am sure I will be able to convince you that a reasonable inference can be drawn to that effect from the testimony that is before you, and if I have overlooked that kind of testimony, it will be briefly supplied and will take no time at all to do it.

It is our understanding that everyone of these credits has been denied our client because he is no longer a wholesale eligible customer.

THE COURT: I really do not think that is a fair way to proceed. I think there does come a time when the burden of the defendant to cross examine and check other things ought to stop. I will not put Mr. MacCrate on this point in the position of having to check records and cross examine and I will not have my time taken up when I feel you have not laid any basis for that.

I will sustain the objection to evidence about obsolescence credits. That is item 1-B. I will sustain the

objection to evidence about stock order discounts denied Item C.

MR. JULIEN: Before doing that, your Honor, I think you ought to bear in mind that Mr. McKee had testified once the card had been taken away from him, he could no longer secure that stock order discount because he could no longer place orders in that fashion. That testimony is in the record and here I think I am correct. Under those circumstances, there is a deprivation resulting on an act of Ford.

MR. MAC CRATE: What was the change in policy of Ford that was involved there? The question is, was it a dealer with a stock order pad and if the orders are given to a dealer, they could be placed on the stock order.

THE COURT: You are claiming the denial of stock order discounts with respect to Parkview, Thomas Motors and Pleasantville?

MR. JULIEN: Yes.

THE COURT: If Parkview, Thomas Motors or Pleasantville made stock orders and got that discount, then it was a matter which they would be entitled to, there is no testimony that Ford would not give Parkview or Thomas Motors or Pleasantville a stock order discount regardless of who they resold.

MR. JULIEN: McKee testified that he could not

secure any stock order discount.

THE COURT: You are not addressing yourself to my question.

MR. JULIEN: I am sorry, sir, if I have missed the point of it, please let me have it again.

THE COURT: When Mr. McKee was dealing with Parkview, Thomas Motors or Pleasantville, he was using their code number and the orders were placed in the names of those entities.

As I understand the evidence and as I understand the undisputed evidence, if Parkview or Thomas Motors or Pleasantville made stock orders, they could get that discount from FMC regardless of who they resold to.

Am I not right?

MR. JULIEN: I do not think so and let me tell you why.

THE COURT: Was there anything, any stipulation that Ford made on the stock order discount that depended on who Parkview sold to?

This was not like a situation of the wholesale incentive allowance, was it?

MR. JULIEN: According to McKee's testimony, yes. McKee testified once he lost his credit card --

THE COURT: You are going back to that point and

that is not the point I am talking about. The second code number was long since lost. I am excluding that, the loss of the code number.

MR. JULIEN: All right, I go further. Now is that McKee has testified that once he was no longer an eligible customer, no discount could be afforded him for stock order.

THE COURT: But a discount could be afforded to Parkview, could it not?

MR. JULIEN: Not on sales to FLM.

THE COURT: On a stock order discount?

MR. JULIEN: That is my understanding.

THE COURT: Maybe I am wrong.

MR. MAC CRATE: The Court is absolutely correct in this regard. Any parts that are ordered on a stock order are entitled to the stock order discount.

THE COURT: It is not like the situation of the wholesale incentive where that depends on who the parts are resold to?

MR. MAC CRATE: That is after the event. This is the basic order placing it and it is automatic. It meets the convenience of Ford because it has to be one day a week for each franchise.

MR. JULIEN: And there is further testimony --

THE COURT: What is the situation?

MR. JULIEN: I have talked to Mr. McKee and he refreshes me, when he testified, he also testified when he was denied the stock order, he was not even furnished with nor could he obtain the forms from Ford necessary to put in stock orders.

THE COURT: We could get a lot faster farther if you would just address yourself to my question. I have a very simple question and that is this:

The stock order discount, if Parkview made a written order on the stock order form and did the other things necessary to get the stock order discount, it got the stock order discount, did it not, and it was not denied it or eligible for it because of selling those parts to FLM. Parkview got the stock order discount, isn't that right, Mr. McKee?

MR. MC KEE: If they had placed the order on the weekly stock order pad, they would have been eligible for a stock order.

THE COURT: It did not make any difference whether Parkview sold to FLM or to the Government of Brazil, did it?

MR. MC KEE: Not to the end of where the parts would go. We would have nothing to do with stock order discount.

THE COURT: That is the only point I am making and

the same thing is true with obsolescence credits, isn't it? Obsolescence credits did not depend on who the end user was?

MR. MC KEE: Obsolescence credits accumulate on all Ford sales to dealers.

THE COURT: And Parkview would be entitled to certain obsolescence credits regardless of who had the parts physically, whether it was FLM or some body shop, right?

MR. MC KEE: Right.

MR. JULIEN: There is still another point to be considered and that is this. Ford knew that we were receiving these discounts from Central. Ford prevailed upon Central and its successor Atlas to stop doing business with us, taking us out of the eligible class, putting us in a position where we had to renegotiate with the subsequent dealers and did not receive these discounts which heretofore we had received, that was an item of damage caused by Ford's cessation of our business.

THE COURT: I thought you might get to that.

You are saying that Ford, with respect to Central and Atlas was the approximate cause of the break-up of that relationship so Ford has to be responsible for all of the terms and conditions favorable or unfavorable which FLM was able to negotiate with Parkview, Thomas or Pleasantville.

I am going to say to you as a matter of law right

now, I may be right or I may be wrong, I would hold as a matter of law that Ford's activities were not the approximate cause of the problems that arose from the negotiations carried out afresh between FLM, Parkview and Thomas and Pleasantville. There has got to be a cutoff.

I will sustain the objection to the evidence and I would say the same thing. The fact that in late 1970 or whenever it was Ford revoked the second code number granted to Central, that in my view is not the approximate cause of some problem about obsolescence credits or stock discounts existing because of the negotiations between Parkview, Thomas Motors and Pleasantville.

I will sustain the objection to evidence about obsolescence credits denied reflected in item 1-B of Plaintiff's Exhibit 106 for identification and 1-C, item 1-C of Plaintiff's Exhibit 106 for identification.

Where do we go?

MR. MAC CRATE: I have made the same objection as to 1-D.

THE COURT: I have not gotten to that.

MR. MAC CRATE: That is an attempt to charge Ford the difference between a five percent paid to Parkview, Thomas and Pleasantville and a three percent paid to Central.

THE COURT: Objection sustained for the reasons

I have already described.

MR. JULIEN: I take it your Honor has given consideration to the written documents put in during the re-examination of Mr. McKee?

THE COURT: I have read them.

MR. JULIEN: Where the clear instructions emanating from Ford passing on to Atlas was to cease doing business with this party?

THE COURT: I do not think they said that. In any event, I have read those and I do not find any basis for changing my ruling.

MR. MAC CRATE: Your Honor, I think if we go to Item 2 --

MR. JULIEN: Before we do --

THE COURT: I would like to understand a little better -- I have already ruled on D.

MR. JULIEN: I want to make an offer of proof with respect to the obsolescence and I want to make an offer of proof with respect to the stock discount.

THE COURT: I do not see we need that.

MR. JULIEN: I am entitled to it and I am required to do it as a matter of fact since I consider this to be an item of damage of the plaintiff.

THE COURT: Your offer of proof consists of the

figures set forth in 106. I take it, right?

MR. JULIEN: Yes.

THE COURT: Then that is the offer of proof.

MR. JULIEN: Your Honor takes that as though it had been established by competent proof and rules it out on the basis it is not an item of damage in this case?

THE COURT: I sustain the objection.

MR. JULIEN: Are you sustaining it because we have not established the method employed in the computing of this?

THE COURT: I am sustaining it on grounds of relevancy.

1-E.

MR. MAC CRATE: 1-E, your Honor, presents a different problem.

MR. JULIEN: Have you ruled on 1-D?

THE COURT: Yes. Objection sustained.

MR. JULIEN: I make the same offer of proof with respect to C and D and the ruling is the same?

THE COURT: Yes.

1-E.

MR. MAC CRATE: If we passed over 1-E I believe your Honor would find that item 2 --

MR. JULIEN: That is another stock order discount item for a different period, your Honor.

MR. MAC CRATE: It suffers of the same impediment of 1-C.

THE COURT: I do not understand. Item 2, as I understand it -- well, it is so stated. It relates to the alleged loss of stock order discounts due to the loss of a separate code during the time of dealing with Central and Atlas January 1, 1971 through November 1, 1972.

What I do not understand there, and it is really a question of approximate cause, at that time Ford's only decision was kind of an administrative one and they determined that they did not want to issue a second code to Central but they continued to sell to Central for resale to FLM and FLM obtained the wholesale incentive discount.

I do not understand the reason why a stock order discount was lost?

MR. JULIEN: The stock order discount was dependent upon the separate code number.

THE COURT: There is nothing in the testimony to support that. It seems to me what the evidence supports is, if FLM had made the necessary request and arrangements with Central so that Central was putting the orders on the right forms even on the single code or that FLM was putting the orders on the right forms itself, the eligibility for the stock discount would have been there.

Maybe there is something else to it.

MR. JULIEN: There is the testimony of McKee and McKee testified that as soon as he lost the code, he could no longer obtain this stock order discount.

THE COURT: Why?

MR. JULIEN: Another fair inference to be drawn from the dates involved, as soon as the code card is withdrawn, the stock order discount no longer goes to him. It is a fair inference to be drawn that this is it and in addition to that, McKee has said, "I have lost it."

THE COURT: It is too broad-brush. The evidence which is really undisputed is, that the stock order discount is a very technical matter. It depends simply on whether the rights forms and timing or orders are used.

The stock order discount was not limited to code number 14330 or whatever that number was. The stock order discount could have been obtained under code number 14 -- the other code number, could it not?

MR. MC KEE: I could not obtain it.

THE COURT: Did you ever ask Central to pass it on to you?

MR. MC KEE: Yes.

THE COURT: What did they say?

MR. MC KEE: There is only one stock order pad issued

to each dealer and the dealer uses that for replenishing his own stock.

THE COURT: Did you ask him to get a bigger pad?

MR. MC KEE: There is only one pad issued to a dealer.

THE COURT: Couldn't you use part of that pad for your orders?

MR. MC KEE: It would mean a segregation, duplication of orders.

THE COURT: Wasn't he willing to do that?

MR. MC KEE: No.

THE COURT: It wasn't Ford's fault. Objection sustained.

MR. JULIEN: Was any reason given to you why it wasn't?

MR. MAC CRATE: Are we continuing now the examination?

THE COURT: We are getting a little informal.

You have put Mr. McKee back but you have not shown any basis at all in my view for this item we have just been discussing. It might help to get Mr. McKee back.

MR. JULIEN: May I withdraw this witness and recall Mr. McKee?

THE COURT: All right.

(Witness Wasser temporarily withdrawn.)

S T E P H E N M C K E E , recalled as a witness, having previously been sworn, resumed the stand and testified further as follows:

FURTHER REDIRECT EXAMINATION CONTINUED

BY MR. JULIEN:

Q During the period you had your own code card, did you put in your own forms with respect to the stock order discount?

A Yes.

Q How did you obtain those forms?

A Those forms were issued by Ford Motor Company to the dealer code 13430.

Q And that was your number?

A Yes.

THE COURT: What was the other number?

THE WITNESS: 11283.

Q Did you get the forms to submit to secure the discount for stock orders after the revocation of your card?

A No. Those forms were not available to me.

Q Tell his Honor why.

A Those forms were retained by the dealer.

Q Is there only one set of forms issued per card?

A Per dealer code.

Q Could there be more than one form submitted for stock order discount per week?

A No, only one submitted per week.

Q So from the time of the revocation of your card, did you subsequently secure any stock discount allowance?

A No.

Q For these weekly orders?

A No.

Q Why?

A Because I had no availability of stock order pads to secure stock order discounts.

Q His Honor asked the question before, couldn't you have put your stock order discount in the form submitted by Central?

A There is no way I can encroach on a dealer or do the dealer's work or, for that matter, could relate his orders with mine on the same pad. It is possible we would both be ordering the same items.

THE COURT: Did you ever ask?

THE WITNESS: We had asked if it was possible to use their stock order pad, but they said they used it every week.

THE COURT: I am not talking about you physically getting the pad. Obviously they wanted to put in some stock

orders each week.

THE WITNESS: Yes.

THE COURT: You were in theory buying from them, weren't you? You were their customer?

THE WITNESS: Yes.

THE COURT: In theory, the orders given to Ford were the orders of Central, weren't they?

THE WITNESS: Yes.

THE COURT: In theory at least, Central could have placed some written orders on its form and resold parts to you?

THE WITNESS: In theory, it could have been done.

THE COURT: Did you ever ask them to do that and say, "so we could get the stock order discount?

THE WITNESS: Yes, I had a discussion with the parts manager on that subject.

THE COURT: What did you ask the parts man?

THE WITNESS: If I could place my orders on their weekly stock order pad.

THE COURT: Specifically you were suggesting that you would call him and tell him the items and he would put them on his pad?

THE WITNESS: Yes, or I would secure his stock order pad and I would write on it the items I required.

THE COURT: And he could add his or you could add yours?

THE WITNESS: Yes.

THE COURT: And you discussed that possibility with him?

THE WITNESS: Yes.

THE COURT: As far as you know that would not have been objected to by Ford?

THE WITNESS: No, not by Ford.

THE COURT: Who was this man that you were talking to?

THE WITNESS: The parts manager of Central was Mr. Joe Dimitri.

THE COURT: What did Joe Dimitri tell you?

THE WITNESS: It would not be feasible. There is no way we could correlate the orders. It would not be feasible or manually possible for Central Lincoln-Mercury to receive the items, sort them, then transfer them to FLM.

THE COURT: The deliveries under stock orders, were those deliveries that would be picked up at Teterboro or were they made by common carrier, mail or what?

THE WITNESS: They are shipped prepaid to the address of the dealer code.

THE COURT: So these stock orders would be shipped

to the address referred to in the order?

THE WITNESS: Right.

THE COURT: Would it have been possible to have on a single stock order, have some parts delivered at one address and some at another?

THE WITNESS: No, it would not be possible.

THE COURT: Were you willing to go and pick the parts up at Brooklyn if they were delivered under that stock order form? Did you talk about that?

THE WITNESS: This would have been an extra expense but we did discuss it. This would cause a problem in the dealership.

THE COURT: But you would have been willing to pick them up there?

THE WITNESS: Yes.

THE COURT: What did he say to that?

THE WITNESS: Owing to the volume of parts handled, their dealership could in no way be able to receive the parts that we would order. It would be a big mixup.

THE COURT: What volume of the total parts that you were ordering at that time were stock order? Let's talk about before the revocation of the code. What percentage were stock order?

THE WITNESS: Approximately fifty percent.

THE COURT: I will sustain D.

FURTHER RECROSS EXAMINATION

BY MR. MAC CRATE:

Q By what means are the stock order deliveries made?

A By common carrier.

Q Various directions can be given to the common carrier with respect to the deliveries, can they not?

A Yes, you could qualify a stock order, that it could be shipped but only to one address. You could not say part of it to go to one address and part go to another address.

Q The instructions you give to the common carrier as to what the common carrier does so far as delivery?

A The instructions to the common carrier would be given by Ford Motor Company.

Q But at the request of the dealer?

A Yes, at the request of the dealer.

THE COURT: Do you have any further questions of Mr. McKee?

MR. MAC CRATE: A letter I requested over the recess was produced to me.

THE COURT: Go ahead.

Q Mr. McKee, I show you Defendant's Exhibit BE for identification and ask you if that is the communication from Central in July of 1972 to which you referred earlier today?

A Yes, that is the communication.

Q And the communication is not directed to you personally, is it?

A No, it is directed to all suppliers.

Q It is just a circular letter to all suppliers?

A Yes.

MR. MAC CRATE: I offer it.

MR. JULIEN: No objection.

xx (Defendant's Exhibit BE received in evidence.)

Q Did you receive any other letter you can recall from Mr. Gordon or from Central at that time?

A Nothing that I can recall.

MR. MAC CRATE: I have no further questions.

THE COURT: We have come to this item 2 and we are going to come to other similar items. Initially it seems to me that the revocation of the second code by Ford was an administrative step which itself I would not think would be a violation of the Sherman Act Section 1 or the Robinson-Pattman Act. To the extent it is a refusal to deal, why, barring certain circumstances I will come to in a minute, it seems to me Ford had a right to refuse to deal with FLM.

The only thing that gives me some problem is the question of Sherman Act Section 2, and I think the law is, that under certain circumstances, particularly if there is a

monopolization, a refusal to deal can be an anti-trust violation.

The record is not fully developed on that.

MR. JULIEN: You are going to have more testimony by way of depositions which I have deferred calling your attention to which may bear upon the subject as well.

I think since you are sitting non-jury, your Honor, it does not unduly prolong the trial.

THE COURT: It just makes more items to have to worry about. I wish the issues were sufficiently crystalized so we did not have to get a lot of accounting material in that really turned out to be ultimately irrelevant.

I will let in -- Mr. MacCrate, let me ask you this: Mr. Julien's point is that on these items I have now excluded or about to exclude, he says it is a non-jury case, there may be some theory ultimately shown which would make these things valid elements of damages. I say I would like to limit your burden and my burden by trying to make a ruling now as to keeping things out. If it could come about that there is some theory which would make these elements ultimately valid, I guess I would have to at some point reopen the trial and go into this if we don't go into it now. I am not a prophet, I do not know what is going to come in regard to his case.

Do you have any views on whether they should come in subject to connection or whether we should try to keep them out subject to the possibility of reopening the record?

Do you understand what I am talking about?

MR. MAC CRATE: Yes, your Honor, and I feel very strongly the desirable thing is to strike them subject to a reopening should they at any time become in your Honor's judgment relevant.

THE COURT: Okay, I will do that. I really do not see the validity of these items under any existing theory of the case.

MR. JULIEN: Then I must put in my offer of proof with respect to each of the items your Honor is sustaining an objection to.

THE COURT: The offer of proof is simply item 2 which is set out in Exhibit 106.

Item E, that is 871,000. That is a big item.

MR. JULIEN: Whenever we come to that, could we have a brief description sufficient to complete my record on it, and does the Court understand, I am sure it does, but I just want to be sure, that the difference in percentage is that flowing from the difference paid between Central and the subsequent dealers?

THE COURT: We have said that three or four times.

Item E.

MR. MAC CRATE: Item E, your Honor.

MR. JULIEN: May I explain what it is, please?

THE COURT: Go ahead.

MR. JULIEN: Item E is the goodwill which is an asset of FLM which I am prepared to show has been destroyed as a result of the withholding of the wholesale incentive allowance, thereby so substantially reducing our margin of profit on crash parts from an accounting standpoint and auditing standpoint, destroy what would otherwise by a valuable asset of this business.

MR. MAC CRATE: It is completely duplicative of the preceding items. If the defendant has suffered an expensible loss and is compensated for that and is placed back in the position of being an operating company compensated for its damages, then this figure which is an estimate of what the business could be sold for, is totally meaningless. The value has been restored.

THE COURT: Let's not jump so fast. The item is labeled, loss of goodwill of FLM due to lack of earning capacity as a result of Ford's change of policy towards FLM.

You have in ink the date April 30, 1972; am I reading that right?

MR. WASSER: Your Honor, it is 9-30-72.

THE COURT: What is the significance of September 30, 1972?

MR. WASSER: It was just before the cutoff of the credits.

THE COURT: Do you have any further questions of Mr. McKee?

MR. JULIEN: No.

MR. MAC CRATE: No.

THE COURT: You may step down.

(Witness excused.)

MR. JULIEN: May we recall Mr. Wasser now?

THE COURT: Yes.

D A V I D L . W A S S E R , resumed.

THE COURT: What is the significance of September 30, 1972?

THE WITNESS: September 30, 1972, the capital figure shown --

THE WITNESS: What are you taking, the end of the last quarter before the November 1, 1972 date?

THE WITNESS: Yes. That was 92,213.

THE COURT: What is the capital?

THE WITNESS: That is the tangible capital excluding goodwill, and in one of the accepted methods of determining goodwill, before we calculate the goodwill, we

exclude an interest factor which an investor would want to earn on the tangible capital. That interest factor came to 7,376.

THE COURT: What did you do with the 7,376?

THE WITNESS: That is to be an exclusion from the profit figure to be used in capitalizing the earnings.

THE COURT: What about the salary factor non-supervisory?

THE WITNESS: We always adjust the profit for a labor portion or salary factor, non-supervisory, also to be excluded from the earning figure to be capitalized and the 40,000 was the figure that was used previously as a factor in the reports to the company.

THE COURT: What is the next item, net profit before taxes?

THE WITNESS: We then reversed all of the net profits -- the net profit before taxes was an actual figure from the ledger in answer to your Honor's question. The officer's salary then reversed. We want to arrive at a net profit before officers' salaries and then from that figure, deduct the interest.

THE COURT: So you added to the actual book net profit, you added officers' salaries?

THE WITNESS: Yes.

THE COURT: Then you added pensions?

THE WITNESS: Pensions to the officers.

THE COURT: Then you are calculating the profit before officers' salaries and before pensions?

THE WITNESS: Yes.

THE COURT: 134,491.

What do you do with that?

THE WITNESS: From that, before we capitalize that, we deduct the interest factor on the tangible assets at an eight percent factor which is widely accepted in these calculations. We deducted the non-supervisory salary factor in order to show a true picture of the calculation and we arrive at an earning figure which the company itself generates.

THE COURT: Why do you deduct the non-supervisory salaries?

THE WITNESS: It is an conservative approach. If a businessman came in to buy the business and if there is available as there is in this case, say $140,000 of salaries before taxes, he may not --

THE COURT: Salaries before taxes?

THE WITNESS: I am sorry, profits before salaries -- we always make a salary adjustment in order to exclude from the goodwill calculation a factor of salary. It is an

conservative approach and it is something I have been doing for thirty years in dealing with these problems.

DIRECT EXAMINATION BY MR. JULIEN:

Q Is it a recommended accounting principle in assessing the goodwill of a concern?

A Yes.

Q Have you followed a formula which is accepted accounting practice for the purpose of arriving at the goodwill of this business at the time of the cutoff date?

A Yes.

On the remaining figure? This method of calculating goodwill, which is an intangible asset, we multiply the remaining figure times ten.

Q Why do you do that?

A In order to arrive at the asset known as goodwill.

Q Are you doing that in accordance with common and accepted accounting practices?

A Yes.

Q What figure did you arrive at?

A I arrived at a figure of 871, 115.

Q Is that the goodwill in accordance with accounting practices of this concern as of the end of the quarter September 30, 1970, just before the cut off?

A Yes, '72.

Q While we are on that subject, from that time on, from 1972, would you tell us what happened to this concern from an accounting and financial standpoint?

A It's arrived at a status on September 20, 1974 of having a minus capital and a deficit.

Q Of what?

A The deficit was 18,607 after receiving a $20,000 tax rebate.

Q That is including the tax rebate?

A Including.

THE COURT: Can you give me those figures, the dates and so forth?

THE WITNESS: On September 20, 1974 the earned surplus had a deficit balance of 18,607 after receiving a $20,000 Treasury Department refund.

THE COURT: Deficit of 18,000?

THE WITNESS: Yes.

Q Just to complete what goes into this figure, what was the margin of profit of your client during the years from '68 to the end of September, 1972? What was its margin of profit on Ford Mercury-Lincoln crash parts?

MR. MAC CRATE: Is this year by year?

MR. JULIEN: Year by year or average over the three years.

A I have it year by year.

Q Give it to us that way.

A To the year ending 9-30-69, it was 28.5 percent of sales.

THE COURT: Is that the year or the nine months?

THE WITNESS: It is twelve months.

THE COURT: What is the fiscal year of FLM?

THE WITNESS: September 30.

THE COURT: What do you, margin of profit?

THE WITNESS: The gross profit divided by sales.

Q FLM sales?

A Yes.

Q 28.5 for that year represented its margin of profit on these crash parts?

A Yes.

Q The next year?

A September 30, 1970, it was 28.3 percent of sales. The year ended 9-30-70 at a gross profit margin on sales of 28.3 percent.

The year ended September 30, 1971, had a gross profit on sales of 31.5 percent.

The year ended September 30, 1972 had a gross profit of 33.5 percent.

For the year ended September 30, 1973, it had a

gross profit of 14.3 percent.

For the estimated, almost completed twelve months September 30, 1974, it had a gross profit of 14.0 percent.

There is just one footnote to September 30, 1973. There was a writeoff of obsolete inventory of about 17,000 which would represent maybe a variation of less than two percent.

MR. MAC CRATE: Might we have the document from which the witness has been reading, marked for identification.

THE COURT: Of course.

What is that, a list of the profit margins year by year?

THE WITNESS: That is a list of the profit margins and the expense margins and I believe I have on that work-sheet the net profit -- the gross profit margins, the expenses other than officers' accounts and the percentage of sales increase over the prior year.

THE COURT: What is the exhibit number?

xx (Defendant's Exhibit BF marked for identification.)

Q How did the cutoff of the wholesale incentive allowance to your client affect its margin of profit?

A It dropped from 33.5 percent to approximately 15 percent.

Q At 15 percent gross profit, what has happened to your client's surplus, has it run at a break-even point, has it run profitably or has it run at a loss?

A It has run at a loss.

MR. MAC CRATE: Object to the question unless the figures are specified.

THE COURT: You have figures about net profit, I assume, don't you?

THE WITNESS: Yes.

THE COURT: What are those?

THE WITNESS: On the financial statement submitted to the Court.

MR. JULIEN: That was on the motion for an injunction.

THE WITNESS: We showed that the earned surplus on 9-30-72 was 103,810. That is restated with footnotes.

THE COURT: 130,000?

THE WITNESS: 103,810. September 30, 1973 it was 17,553.

At September 20, 1974, and I had previously given your Honor this figure, it was 38,607 before deficit, minus value, before the 20,000 refund recently received. A non-earning factor. 38,607 deducting the 20, it came to a deficit of 18,607.

Q There is one other factor I would like you to give his Honor. I would like you to compare the total sales of 1972 and 1973?

THE COURT: Haven't we got that?

MR. JULIEN: Yes. It is on the assessment.

THE COURT: In this item 1-E, loss of goodwill. You are assuming that the goodwill has gone, the goodwill value has gone from 871,000 as of September 30, 1972 to zero now; is that right?

THE WITNESS: Yes, your Honor.

THE COURT: How do you get zero?

THE WITNESS: If I may refer to the addendum No. 5 which was submitted, calculated by me, if you look at --

THE COURT: That is 107.

THE WITNESS: Column No. 3 would show the buildup of goodwill, the percentage of increase of profit over the control officers' accounts was 64.7 percent a year annual mean, and excluding the earlier years --

THE COURT: I do not get you. Percentage of increase of what?

THE WITNESS: The annual mean increase of net profit before officers' accounts was 64.7 percent. Annual average.

Going just to the prior three years on the higher volume before the cutoff, the three years before the cutoff,

it was 25.2 percent.

THE COURT: Average?

THE WITNESS: Average.

THE COURT: Increase per annum?

THE WITNESS: Yes, per year.

With that type of situation, the goodwill at 9-30-72 was tremendous.

At this point, a new history would possibly have to be established. There would be no way, if this company would try to be sold, it would have to rebuild a new history if that were possible. Goodwill is always established on the history of a company and that goodwill has been destroyed in my opinion.

Q By the destruction of earnings?

A By the destruction of earnings.

Q As a matter of fact, for the years '73 and '74, in each case since September 30, this business has been operating at a loss; is that correct?

A Yes.

Q Up to the cutoff date of September 30, 1972 in the entire history of this company, had it ever reflected a loss in any fiscal year?

A It is reflected in item 5, it is shown in item 5 of the addendum to plaintiff's proposed assessment of damages.

Q Is it shown that it has never run at a loss before?

A Yes.

THE COURT: In other words, you are calculating what the business could be sold for to a buyer?

THE WITNESS: Yes.

THE COURT: Let's suppose for purposes of argument that the Court were to find in favor of the plaintiff and were to order Ford to make available the wholesale incentive discount. That would eliminate the main problem which you say took away the earnings and the goodwill, right?

A It would not eliminate the problem of goodwill as I had pointed out to Ford's counsel two years ago, because as time goes on with the lapse of the period of earnings, the goodwill is destroyed. You have to show the trend of the profits to establish the goodwill. There has to be a trend.

THE COURT: Goodwill also relates to prospects, does it not?

THE WITNESS: It is sort of a weaker type of goodwill. I agree with your Honor.

THE COURT: The fellow who is coming in to buy a company wants to know the prospects. History is very interesting but he wants to know what is there now. He is not just running a history. He comes in and he suddenly finds out that the conditions that have caused these losses have been

reversed by Court order, let's just take it in slow steps, that would affect his valuation of the company, would it not?

THE WITNESS: Yes.

THE COURT: Your calculation here does not take into account the existence of any such Court order, does it?

THE WITNESS: No.

MR. MAC CRATE: Nor does it take into account --

THE COURT: Why don't you let Mr. Julien finish, then you cross.

BY MR. JULIEN:

Q Let's get to item 3 on page 3 -- before I ask that, just one further thing.

When there is a transaction, for the purchase of a sale of a business, in the accounting formula, isn't the formula which you have employed the thing that buyers and sellers rely upon?

A Yes.

Q That is, actual financial earnings over a period of years?

A Yes.

Q Now let's get to item 3 --

MR. MAC CRATE: With respect to item 3, I would move to exclude any testimony on the grounds that it isn't relevant.

THE COURT: Let's look at item 3.

MR. JULIEN: Perhaps I can briefly tell your Honor what that item includes.

THE COURT: Okay.

MR. JULIEN: Here we are depending upon that phase of our case that says we should be permitted to be purchasing our parts directly from Ford Motor Company, and that it is a violation of law for it to exclude a wholesaler known to it and known by it to be handling its goods and wares, to exclude it from the right to make purchases.

THE COURT: Under what statute do you make that claim?

MR. JULIEN: That, I think, is a monopolization.

THE COURT: In other words, Section 2?

MR. JULIEN: Yes. I do not see our case, your Honor, as falling within the restricted Colgate situation.

THE COURT: All right.

MR. JULIEN: Here what is being sought is the period we paid two percent to Central, raised to three percent in 1970, to Central and that is what that item encompasses. The two percent and the three percent we paid to Central during that period and it ends in September 20, 1974.

Q Why do you have that at three percent?

A Because the two percent is included in another phase of the proposed assessments of damages.

Q In other words, to avoid duplication?

A Yes.

MR. MAC CRATE: This goes back long before the Statute of Limitations, your Honor, then begins to accumulate items.

MR. JULIEN: There is no Statute of Limitations in this case. I have seen nothing in the pleadings about any Statute of Limitations.

MR. MAC CRATE: There is a four-year State of Limitations.

MR. JULIEN: It is not raised by you.

THE COURT: I am not sure the complaint specified damages going back to 1965, but I am not sure it did.

THE WITNESS: Yes, it did.

MR. JULIEN: Since he is the scrivener of the complaint, I guess that gets us as close to it as we can.

THE COURT: Glancing at the complaint, there is a statement in paragraph 5 about the commencing of business of FLM in April of 1965 and then you have, in paragraph 17 a statement about -- paragraph 16, in mid-1972, FLM was advised it could not have its separate code number and that the incentive credit of 16 percent was no longer available.

Talking about mid-72.

Then paragraph 17 talks about mid-72 but at the end it says prior to the 1972 increases of cost to FLM, the latter was required throughout its years of operation to pay surcharges to Ford dealers for the authorization to obtain Ford parts at wholesale prices.

Paragraph 20-C refers to the alleged preventing of FLM from buying wholesale parts without prohibited penalties.

You say that Ford should have pleaded the Statute of Limitations in order to take advantage of it?

MR. JULIEN: Yes.

MR. MAC CRATE: We asserted the Statute with respect to discovery consistently.

MR. JULIEN: I don't understand what that means.

MR. MAC CRATE: The statutory --

THE COURT: The four-year statute.

MR. JULIEN: In addition to being absent from the pleadings, it is in no way stated in the pretrial order.

MR. MAC CRATE: There is no claim for damages in the pretrial order.

MR. JULIEN: It is affirmative defense. Statute of Limitations always is.

THE COURT: I think in all fairness, I think that under Rule 8-C, it is true that Ford should have pleaded the

Statute of Limitations as affirmative defense, but the claims for damages was stated in such general terms that maybe it is something that is understandable why they didn't do it and when it comes to trial, it is true you provided no specification of your damage claims until you got here.

MR. JULIEN: Nor was I asked to until your Honor suggested it. No interrogatory --

THE COURT: I wish you would let me finish. I do talk slowly.

MR. JULIEN: Please forgive me.

THE COURT: I asked you to specify all your contentions and that included damages.

I have permitted you to put in your damage thing but Mr. MacCrate can assert the Statute of Limitations and the answer will be deemed amended to so state.

Where does that lead us?

MR. JULIEN: What is the date of institution on our action?

MR. MAC CRATE: This would mean that anything prior to February 14 -- February 19, 1969 is statute barred.

MR. JULIEN: I object to your permitting an amendment of the pleading at this stage, if your Honor pleases.

THE COURT: What is the prejudice?

MR. JULIEN: The prejudice is that it eliminates

certain years to which we are entitled.

THE COURT: The law did not permit you to have those years. It is just really a matter of whether had you relied on this and prepared -- I will not really belabor the point. The law did not permit you to have those years and I think under all the circumstances, we ought to enforce the law and that is the way we are going to leave it. We will permit Mr. MacCrate and Ford to have the benefit of a statute that they are certainly entitled to have the benefit of.

Does that cut out anything we have talked about?

MR. JULIEN: Under item 3, it would simply cut out the years '66, '67 --

THE WITNESS: Approximately five-twelfths of the four lines.

MR. JULIEN: The year ending July 30, 1969.

THE COURT: We cut out '65, '66, '67, '68 and part of '69?

THE WITNESS: Yes.

THE COURT: What would it leave in '69?

THE WITNESS: It would leave a little bit more than two-thirds. It would be 4.7 over 12 would be excluded.

THE COURT: We will start, in theory, at February 16, 1969?

THE WITNESS: Yes.

THE COURT: Can you give me a figure of what it would be?

THE WITNESS: Yes. Approximately 40 percent. 207,000 that would be allowable.

THE COURT: So we are taking two percent of 207,000 and that is $4,140?

THE WITNESS: $4,140.

Q Taking that figure, substituting it for the $44,000 figure, what total do you get under this item? That would be 79188 plus 4,140; is that right?

A Would you repeat the question?

THE COURT: We are going to figure a total of 4,140 and --

A It is a difference of $20,128 that would be deducted from the bottom figure of 13,456.

Q Just give us the net figure.

THE COURT: 83,328. That is the claim based upon the payment of two percent and three percent premiums to dealers for the years in question, right?

THE WITNESS: Yes.

THE COURT: Do you have any other objection?

MR. MAC CRATE: Yes. This would be duplicative of damages claimed in other portions of this and, therefore, I would assume it would be in the alternative --

THE COURT: How would it be duplicative?

THE WITNESS: Your Honor, item 1-D is the difference. It would not be duplicative. It is five percent less three which would qualify the two.

THE COURT: Item 1-D which we have excluded is a claim for an increase from a three percent premium to a five percent premium?

THE WITNESS: Yes, your Honor.

MR. MAC CRATE: I believe my notation related to 1-D. With that now excluded --

THE COURT: With those changes, I will admit the evidence about item D which Mr. Wasser has gone over.

MR. JULIEN: I must call one matter to your attention. Since D is excluded, in order to avoid a duplication, Mr. Wasser had taken the reduced percentage of three percent rather than five percent and under that item, under this claim of damage, I would be entitled to the five percent. It would be appropriate to add to it the $20,900 figure to bring it up to five percent.

THE COURT: I will tell you what --

MR. JULIEN: That is all within the Statute of Limitation period because we didn't pay five percent way back then.

THE COURT: This depends entirely upon whether there

is a case under Section 2 and that is quite questionable, but I think it probably should be admitted.

I will admit item 3, and --

MR. MAC CRATE: May I inquire, when you say you will admit, you will now receive evidence about it?

THE COURT: Sure. It is not decided it is a valid Section 2 complaint. I am just admitting it because I think there is enough ground for admitting it into evidence, subject to, of course, whether there is a valid Section 2 claim or not.

MR. MAC CRATE: I object to the data set forth in item 3 as not having sufficient substantiation on the record at this time, and I must preserve my objection on that basis.

THE COURT: You are not objecting on relevancy grounds. You are objecting to lack of foundation?

MR. MAC CRATE: In other words, to the substance of the material that appears under 3.

THE COURT: For lack of foundation?

MR. MAC CRATE: Yes, your Honor.

THE COURT: Isn't this, Mr. Wasser, simply a calculation? You have taken the cost of goods sold, the cost of the parts from the books and you have applied these percentages, the two percent and the three percent?

THE WITNESS: Based on the actual payments to the

dealers.

THE COURT: I will overrule the objection to lack of foundation.

MR. MAC CRATE: May I be heard on one aspect?

THE COURT: Yes.

MR. MAC CRATE: A rough lunchtime computation indicated that nine percent of the purchases at a period were not from Ford.

MR. JULIEN: Isn't that a matter of cross examination?

THE COURT: Is there some amendment or correction which you made to this?

MR. JULIEN: No. Our percentages have been taken on total purchases at all times.

THE WITNESS: That is for the wholesale incentive, yes.

MR. JULIEN: He is talking about something else, I think.

MR. MAC CRATE: For non-Ford purchases, I don't see how they could possibly be part of the computation here that is reputedly losses due to inability to purchase from Ford.

MR. JULIEN: I see the point.

THE COURT: Should there be a correction?

THE WITNESS: Your Honor, the explanation is that

it should be -- it is not nine percent, but there should be a correction.

THE COURT: Why don't you work out the correction.

That correction will be taken into account, Mr. MacCrate.

MR. MAC CRATE: There is a further question, I apologize, your Honor, with respect to a cost writeoff of obsolete inventory of $14,000.

THE COURT: Where is that?

MR. MAC CRATE: It does not appear on this but the figures for September 30, 1973, based upon other material we have been provided in the past, seems to relate to an amount for which we were given an adjustment and I really feel without the foundation for these particular figures being put in the record, we are in a very difficult position.

THE COURT: I take it over lunch you did not get together over these as thoroughly as you needed to?

MR. MAC CRATE: No.

MR. JULIEN: This item was discussed. Perhaps there is an explanation for it.

BY MR. JULIEN:

Q Would you give the explanation?

A The writeoff of obsolescent inventory was not included in the parts cost sold in these exhibits.

THE COURT: The parts covered by the writeoff?

THE WITNESS: Were not included in any of these calculations of parts cost sold.

THE COURT: What about that, Mr. MacCrate?

If there is any checking to be done, we do not have to sit here and theorize about it. We could be deferring it until Monday. Shall we?

MR. MAC CRATE: Yes.

THE COURT: Also, I think I should go back as to item 1-D and that, I think, if there is a valid Section 2 claim relating to failure to sell directly, then it could be that item 1-D presents a valid element of damages. I will reverse my ruling as to relevancy on item 1-D, but let's go back over this Monday and can we go to something else now?

MR. JULIEN: All I need is that final document 107 in evidence.

THE COURT: What about these attorneys' fees and cost?

MR. JULIEN: That, I don't think, belongs in an estimate by counsel. That is a matter entirely with the Court.

THE COURT: We will not get into that now.

BY MR. JULIEN:

Q What is item 5 on Exhibit 107? What does that represent and how did you compute it?

A We computed --

Q What does it represent first?

A It represents a loss of profit to FLM due to the interruption of its growth as a result of the removal of these credits.

Q How did you compute that?

A I computed the figures from the books of the company. I calculated the average growth; the average annual percentage of growth over seven years and also over the three prior years to the cutoff of Ford's credits. I then used the smaller figure, which was the three prior years to the cutoff and projected on page 2 of this addendum what the growth increase loss was for the first year after the cutoff and for the second year after the cutoff.

Q Let me see if I have it. Were you using sound and accepted accounting principles?

A Yes.

Q By that, based on previous experience, you were projecting what the profit would have been during the subsequent years after the termination of the wholesale incentive discount?

A Yes.

Q Using that accepted formula, you arrived at these profit figures shown for those subsequent years which your

client did not earn; is that correct?

A Yes.

THE COURT: What is that, 88,000?

THE WITNESS: $88,968.

THE COURT: I do not think you intend to add that to the item 1-A, do you, the 182,000 in lost incentive credits?

THE WITNESS: There is no duplication, your Honor.

THE COURT: If you are going to figure it on a profit basis --

THE WITNESS: But I have subtracted the bases of 93722.

Q Do they represent a duplication?

A No.

Q I think you better explain for the record why they do not.

A If the profit were a level figure, then his Honor would be right because we included the claim for incentive credits lost, but the company had a growth rate of 25.2 percent and this represents the difference only between what the profit would have been on this projection less what it was on 9-30-72.

THE COURT: I just do not understand you.

THE WITNESS: The profit for the year ended 9-30-72 was 156,803. Multiplying that by 125.2 percent or an increase

of 25.2 percent, comes to a figure of 196,317.

We then deduct the base period that we started with, the 156803 and if the company had continued on its normal plane, the fiscal year ended September 30, 1973, it would have had an additional profit of 39,514.

THE COURT: Sure.

THE WITNESS: Then we go to the next year, starting at the beginning of the second year, which is the 196317, the projected or estimated figure, we then multiply that by 125.2 percent to reach a figure of 245,789. Deducting the profit level at the beginning of that year, 196,317, we find that for the fiscal year ending September 30, 1974, the growth increase loss was 49,472.

THE COURT: I understand that. There you are figuring how much profit was lost because of the denial of the investment incentive discount, right?

THE WITNESS: And the fact that the working capital --

THE COURT: The whole thing, whatever Ford did caused these profits to be lost.

Now, my feeling is that the lost profit is the kind of net of the damages, so to speak, that you have to choose what theory of damages you are going to use. You are going to either choose to award, sort of what I will call the

net, that is, the lost profits, or you are going to choose to aware the specific components, the loss of the wholesale incentive discount, the loss of some other discount, so forth and so on, but you cannot have both.

THE WITNESS: Your Honor has wiped out this definite element. In other words, for seven years the company grew at a rate of --

MR. JULIEN: He is talking about the increased margin.

MR. MAC CRATE: That is a matter of total speculation.

If you run down the right-hand column, it goes from 120 to 12 and then it is 202 and to then pull out of the air what is claimed to be an average figure of 64.7 --

THE COURT: I am trying to get at a little different point.

It really is a matter of law. If Ford is liable to FLM, what is the measure of damages? Do we take the figure for wholesale investment credits lost or do we figure out how much profit after various things have happened, FLM would have earned if it had gotten the wholesale incentive credit. Which do we take?

MR. JULIEN: I have two answers. First, the question necessarily depends upon, are these duplications,

and I will answer that secondarily. First let me point out they are not duplications.

THE COURT: Just answer my question.

MR. JULIEN: The rule is with respect to items of damages such as this, that it is our duty to place before the Court all of the evidence bearing upon it. If there is duplication, we can thereupon elect at some final date which item we stand upon, but if there is no duplication, we may urge both upon the Court.

Let me show you why there is no duplication --

THE COURT: Let's do this. I get your point and you certainly have a right to get into evidence the amount of that 1-A item, so we won't worry now about what is the right theory. We will pin that down later.

Let's assume, though, Mr. MacCrate, it is relevant to show lost profits as a result of Ford actions.

Do you have any objection to item 5 on that assumption?

MR. MAC CRATE: Again, I believe there is a lack of foundation for its introduction at this point.

THE COURT: Do I understand all the figures in columns 1 through 3 come from the books and records of FLM?

THE WITNESS: Yes, your Honor, except that the current year is so current that this is a conservative estimate.

THE COURT: In other words, that is an estimate based on certain items in the books and records?

THE WITNESS: Yes, but does not enter into the calculations.

THE COURT: Columns 4 and 5 are calculations based on columns 1, 2 and 3?

THE WITNESS: Yes.

THE COURT: I will admit --

MR. MAC CRATE: Excuse me, your Honor.

Is the figure for 1972 the restated figure or is that the earlier figure?

We have been given two sets of figures, your Honor, heretofore and what the books of the company, in fact, reflect, I am not clear.

THE WITNESS: In my memorandum to the Court, I attached auditors' notes explaining that. I don't have that memorandum before me.

THE COURT: Why don't we take a short recess?

(Recess)

THE COURT: I understand you want to adjourn.

Are you finished with your case except for some checking into these figures which we could go into Monday? Will you rest after that?

MR. JULIEN: Yes, except for the references I must

make to your Honor of the parts of the depositions which I consider to be part of my case and I will have one question of Mr. McKee and that will be it.

MR. MAC CRATE: May I ask specifically, we brought Mr. Gilpin from Texas to be here today at the request of plaintiff. He has been sitting in the courtroom all day. Do I understand from this he is now excused?

MR. JULIEN: Mr. Gilpin is the auditor that examined our books on behalf of Ford.

THE COURT: Do you need him and can he be excused to return to Texas?

MR. JULIEN: The answer is, yes.

THE COURT: Then he is excused and he can return to Texas as far as you are concerned.

On the depositions, I am engaged Friday, Friday is a day of conferences so I cannot do anything Friday on this case, but on the depositions, I wouuld appreciate you simply designating, underlining in red or bracketing in red the portions you want to introduce in evidence.

Are there any portions of those depositions, any deposition transcripts you are going to want to use?

MR. MAC CRATE: It would only be in the ones that the plaintiff is marking. I would request that we have their markings on Friday so we would be ready on Monday morning.

THE COURT: Excellent. We will handle it that way so the depositions do not need to take any time.

You will rest subject to exactly what we have talked about just now and I will see you all Monday.

Will I get anything more from Ford, on the points I asked about Monday morning?

MR. MAC CRATE: We are trying to do several things simultaneously and I believe our brief will not be ready until after Monday. If we can accelerate that, indeed we will, but we do have a substantial amount of ground to cover between now and Monday and we will be devoting ourselves to that.

MR. JULIEN: Plaintiff would like an opportunity to reply to their brief.

THE COURT: I really think that the issues I posed were the obvious issues in the case. That is what I am trying to go over in my mind right now and I am spending time on the law. I am very anxious to be really clear on Ford's theory how you get around the language in the Schwinn case and if there is any law about permitting Ford to vary its discount terms in the way it has done here based on levels of distribution and so forth, I would like to know that law so I can begin to consider it. Isn't there any way you can provide me with some material that addresses itself to those points? We are trying to work on the law, and even if

you have some cases you could call in, anything, just to help accelerate my work on the law, I would appreciate it.

MR. MAC CRATE: We will do whatever we can.

MR. JULIEN: If counsel calls in some authorities, I take it he will let us have them?

THE COURT: Sure.

(Case adjourned to Monday, September 30, 1974.

WITNESS INDEX

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FILM COLLISION PARTS, INC.

vs.

FORD MOTOR CO. and FORD MARKETING CORPORATION

New York, September 30, 1974,

10:00 a.m.

Trial resumed.

- -

THE COURT: I received the Sullivan & Cromwell brief Saturday afternoon. Obviously you will have a chance to review it and submit your brief.

Let me ask you this. On the Section 2 claim, have you considered -- and maybe it's in the papers and maybe I haven't focused on it -- but I will ask you, have you considered the problems about the line of commerce, product market, geographic market, all those problems, or not? Have you considered those?

MR. JULIEN: I think the stipulation handles that fairly well so far as the product market is concerned since it is exclusively a Ford product, if that is what you are thinking of, and so far as the geographical market is concerned, I think it is once

rka

again agreed that the source is obtained solely from Ford and nowhere else for the entire country, so whatever consideration I gave to it is covered entirely by the stipulation.

THE COURT: Go ahead with your case.

MR. JULIEN: In our reply brief, which we are working on now, we also take up the question of indirect purchase under the Purolator cases and the FTC guidelines.

D A V I D W A S S E R resumed.

DIRECT EXAMINATION CONTINUED

BY MR. JULIEN:

Q Mr. Wasser, as a result of some of the conferences held during our recesses on Wednesday between yourself and counsel for the defense, did you make an additional study of the incdntive allowances in which case you used only the Ford crash parts as the basis for your allocation of what FLM was deprived of during the period it did not receive the wholesale incentive?

A Yes, I did.

THE COURT: May I have that question read?

(Question read.)

MR. JULIEN: In the assessment given by Mr. Wasser on Wednesday he employed 16 per cent overall

of all parts handled by FLM. Now he restricts himself just to Ford parts.

THE COURT: Fine.

Q You are restricing yourself just to Ford crash parts handled by our client during the period it did not receive the wholesale incentive allowance.

What percentage of just the Ford crash parts did you take for the wholesale incentive allowance deprived?

A The percentage came to 19.6 per cent.

Q How did you arrive at 19.6?

A I took the actual incentive credits allowed for the fiscal year ended September 30, 1972, the year before the cutoff, and divided that by the actual percentages of Ford crash parts by FLM.

Q And that gave you this --

A 19.6 per cent.

Q Taking 19.6 per cent of Ford crash parts handled by FLM after the cutoff,what figure do you arrive at for wholesale allowance which the client, plaintiff, did not receive?

A 220,041.

Q Just for the sake of reference, is that higher or is that lower than the figure which you set

forth as the wholesale incentive which FLM was deprived of in your testimony and exhibit on Wednesday?

A It is approximately $38,000 higher.

Q The figure favors your client?

A Yes.

THE COURT: In that 220 is higher. Let's go ahead.

Q During all of the period that FLM did business with both Central and Atlas was there ever an occasion where it was delinquent in the payment of its bills?

MR. MAC CRATE: Objection, your Honor.

THE COURT: Overruled.

A No.

Q Has there ever been a time during all of that period that either Central or Atlas sent a collection letter or instited any kind of proceedings for the collection of a bill?

A No.

MR. MAC CRATE: Objection.

THE COURT: What is the ground of your objection?

MR. MAC CRATE: This witness is on the stand at this time as an accountant and he is now being asked

questions about the business experience of FLM.

THE COURT: I don't see that that is any ground for objecting.

MR. MAC CRATE: There is no basis for interrogating this witness on this subject.

THE COURT: What is the problem? Are you talking about a hearsay problem or what?

MR. MAC CRATE: Yes. There is no testimonial qualification whatsoever.

THE COURT: In view of that objection, you better ask about his knowledge.

Q Were you familiar with the manner in which your client, FLM, was paying its bills? Were you familiar with any problems it might have had with respect to any claimed delinquencies in payment?

MR. MAC CRATE: Objection.

A Yes, I was.

Q How were you familiar with that?

A My monthly audits and partial writeups of the company's books.

Q Again, during that occasion would there have been any instance where either a collection letter, suit was threatened or actually instituted?

MR. MAC CRATE: Objection as leading.

THE COURT: Overruled.

A No.

Q There has been some testimony here --

THE COURT: You say FLM, to your knowledge, was never delinquent in its payments to any of the agencies it was dealing with?

THE WITNESS: Yes.

THE COURT: And you never saw any record of any collection letters or anything of that kind with respect to delinquent accounts?

THE WITNESS: No. At the very end, with the dispute over the incentive credit, that was the only thing.

THE COURT: The one with Atlas?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q There has been some testimony here about an exhibit received with respect to an application for a bond in behalf of FLM for purchases made from Central; do you remember that?

A Yes.

Q Did you have anything to do with that bond?

A Yes.

Q Or that bond application?

A Yes.

Q Would you tell his Honor the circumstances surrounding that, so far as you know it from your own personal knowledge?

A I prepared the application for the bond, and with the purpose of releasing the passbooks that had been pledged as escrow under the original agreement. During the course of the application we found that our credit standing was so good with the supplier that there was no need to pursue the bond application further, so we withdrew our application and subsequently received the books back from the supplier.

Q That is the original --

MR. MAC CRATE: I object and move to strike what the witness found as being hearsay.

THE COURT: What is hearsay?

MR. MAC CRATE: Well, we found that our credit standing was so good -- there is no indication of what information actually came to this witness. It is a conclusion drawn by the witness with no indication of the communications on which it is based.

THE COURT: Overruled.

Q The original indemnity was returned?

A It was returned.

Q Was any bond furnished?

A No.

Q And business continued with Central thereafter?

A Yes.

MR. JULIEN: That is all, sir.

THE COURT: You may cross examine.

MR. MAC CRATE: My colleague, Mr. Carrad, will cross examine, your Honor.

CROSS EXAMINATION

BY MR. CARRAD:

Q Mr. Wasser, you testified a few moments ago that to your knowledge PLM had never been delinquent in its payments to its suppliers?

A Yes.

Q For what period of time were you speaking?

A Through the period of time prior to the dispute over the incentive credits.

Q Which is what date, sir?

A Our claim for incentive credits was during the period July to October, and pending the --

THE COURT: Of 1972?

THE WITNESS: Yes, your Honor. Pending the statement from the bookkeeper which I had requested a number of times over the phone, we could not settle with Atlas fully until April, 1973.

Q Would your answer about the delinquency in the payments be the same fo r the period following, let's say, November 1, 1972?

A We settled the account in April, '73. On that day we received a statement from Atlas' bookkeeper.

Q You testified to that, Mr. Wasser, but were there any delinquencies in FLM's payments due to its suppliers after November 1, 1972?

A No.

Q Was the method of payment changed?

A With one dealer I believe it was changed.

Q Wasn't FLM required to pay for its purchases more frequently after that time, on a weekly basis, rather than a monthly basis?

A I believe with Thomas Motors there was a -- yes.

Q Mr. Wasser, I want to try to save a little time. When you prepared -- you did prepare Plaintiff's Exhibits 106 and 107 for identification?

A Yes.

Q And you testified that in the course of doing that you examined FLM's records. Did those records which you examined include financial statements prepared by you for the fiscal years 1965 through 1974?

A Yes.

Q Yesterday when I took your deposition we went over those financial statements and we had them marked as Defendants' Exhibits for identification BS through CC, and I would ask you if these are the financial statements which you prepared for FLM (handing).

A Exhibit BZ 1d is a statement that was superseded.

Q I think that is reflected on the document?

A Yes, September 30, '72, BZ 1d superseded by CD 1d.

THE COURT: What you say,"1d," means for identification?

THE WITNESS: Yes, your Honor.

MR. JULIEN: Marked in the deposition.

THE COURT: All right. Go ahead.

MR. CARRAD: I offer them in evidence.

THE COURT: May I see them?

MR. CARRAD: I have labeled them consecu-

tively starting with the earliest years, your Honor.

(Pause.)

BY THE COURT:

Q Do I understand that the statement as of September 30, 1972, which took its original form in Exhibit BZ, has now been corrected or superseded?

A Yes, your Honor.

Q Where do the new figures appear? Are they in the CB document?

A Yes.

THE COURT: All right. No objection to these documents?

MR. JULIEN: No, your Honor.

THE COURT: All right. Received.

(Defendants' Exhibits BS through BZ and CA through CC were received in evidence.)

Q Mr. Wasser, when I took your deposition yesterday I asked you whether you had prepared any adjustments to item 1A of Plaintiff's Exhibit 106 to take into account parts not purchased from Ford or Lincoln-Mercury franchise dealers.

MR. JULIEN: What page is that?

THE COURT: Why don't you let him finish his question.

MR. JULIEN: He has finished. I am asking for a page reference in the deposition so I can follow it.

THE COURT: I didn't understand that he finished his question, but maybe he did. What was your question.

MR. CARRAD: Your Honor, my question, I was asking Mr. Wasser if I had asked him at his deposition which I took yesterday morning at 10 o'clock--if I asked him at that time if he had made a computation of the adjustment to be made to certain items of damage to take into account the fact that not all of FLM's purchases were from Ford and Lincoln-Mercury dealers.

THE COURT: It is in the deposition, I assume. What's the answer?

A Your question is whether you had asked me?

Q Yes.

A Yes.

Q What did you respond?

MR. JULIEN: Now I ask for a reference, your Honor.

THE COURT: What's the page?

MR. CARRAD: Your Honor, that would be pages 57 and 58 of Mr. Wasser's deposition.

THE COURT: It says what it says, and you have the transcript. You don't have to ask this witness, do you?

MR. CARRAD: Sir, your Honor, I have the transcript, but I don't have one that has been signed or corrected by Mr. Wasser.

MR. JULIEN: It can be used.

THE COURT: What are you leading to? Ask the next question. The deposition says that, I take it?

MR. CARRAD: Yes, your Honor.

THE COURT: All right. Then what's the question?

Q Mr. Wasser, you stated on the stand a few moments ago that you now revised your estimate of the percentage of FLM's total purchases which would be attributable in some fashion to the wholesale incentive allowance from 16 per cent to 19.6 per cent.

A Yes.

Q Is that not -- may we round that off at 20 per cent for the purposes of discussion?

A Yes.

Q The wholesale incentive which you used was 25 per cent on a particular part which was eligible for

the wholesale incentive, isn't that true?

A I didn't use 25 per cent. This was -- the 25 per cent was used on the actual statements of the dealers on the eligible item.

Q But an eligible part received a 25 per cent wholesale incentive allowance?

A Yes.

Q Since you have calculated that 20 per cent of FLM's purchases would be the amount attributable to the wholesale incentive allowance, isn't that just another way of stating that 80 per cent of the parts which FLM purchased were eligible parts?

A No.

Q If 100 per cent of the parts had been eligible and you got a 25 per cent incentive, your figure would be 25 per cent of all purchases, isn't that true?

A Yes.

Q You say it is 20 per cent and my colleagues, 20 is 80 per cent of 25?

A Yes.

Q So wouldn't it be correct to say, then, that 80 percent of FLM's purchases were of eligible parts?

A Yes.

Q And you testified that you derived this 18.6 percent figure for the fiscal year 1972, did you not?

A Yes.

Q If in that fiscal year 1972, if we look at all Ford crash parts which are offered for sale and we find that a certain percentage, let's say, for example, 80 percent, are eligible parts, but that in succeeding years, such as 1973 and 1974, the crash parts which Ford has to offer on the marketplace that the percentage of eligible parts drops from 80 percent to a substantially lower figure, would not that affect your calculation?

A Yes.

Q And have you corrected FLM's records against the price book which shows the eligible parts for the years 1973 and '74 or for any sample short period out of any of those years?

A This would take such a long time that we could not have it by today. It would be a tremendous amount of work.

Q Can it be done from FLM's records and the Ford price book?

A It can be done.

MR. CARRAD: Your Honor, at this time I would move to strike the item of damages set forth in Item 1-A of Plaintiff's 106 because this is a mere speculative estimate of what something would have been in 1973 and 1974, and there has been no effort to make an exact calculation.

THE COURT: Have you?

MR. CARRAD: Sir?

THE COURT: Have you?

MR. CARRAD: Your Honor, we will be offering testimony that there has been a change.

THE COURT: Then you will make it more specific. Motion is denied.

Q Mr. Wasser, as to Item 1-A of Plaintiff's Exhibit 106, this entire calculation assumes, does it not, that FLM would have continued to deal with Atlas Lincoln-Mercury on the exact same terms it was dealing with that entry prior to November 1, 1972?

A No.

Q Atlas Lincoln-Mercury and its predecessor Central Lincoln-Mercury were the only dealers who ever had wholesale incentives from FLM, isn't that so?

A Atlas , Central -- yes.

Q And Atlas and Central were the only entities which accordingly reduced their prices to FLM by an amount equal to the wholesale incentive they received, isn't that so?

A I believe so, yes.

Q And Atlas and Central were the only entities which were willing to sell to FLM at 2 percent and later 3 percent above dealer price, isn't that so?

A Yes.

Q This calculation you have down here in Item 1-A shows the -- purports to be incentive credits removed, and the only entities which had ever given FLM any kind of corresponding reduction in price were Atlas and Central, so doesn't this necessarily assume that this would have gone on as they had prior to November, 1972.

A Could you repeat that question, please?

(Question read)

A Yes.

MR. CARRAD: Your Honor, at this time I move to strike Item 1-A and all testimony associated with it on the ground that it's too speculative, that there has been no testimony introduced that Atlas and Central could have continued this relationship after November 1, 1972, or any other source of supply --

eljw 4 Wasser-cross

THE COURT: Oh, Mr. Carrad, really. Is there any indication that if Ford had not changed its policy Atlas or Central or whoever was dealing would not have gotten the whole incentive and passed it on?

MR. CARRAD: No, your Honor, but there is no evidence that that would have happened and I believe it's up to the plaintiff to carry that burden, and I might say that the --

THE COURT: Okay. Motion is denied.

MR. CARRAD: I will pass over Item 1-B and 1-C which were excluded by the Court last Wednesday, and go on to Item 1-D.

Your Honor has allowed evidence about Item 1-D to come in subject to plaintiff establishing a claim under Section 2 of the Sherman Act so we will make a motion to strike at the end of the plaintiff's case.

You Honor, at this time I would make a motion to strike Item 1-E as entirely speculative, and having no foundation, no proper foundation established by the plaintiff.

THE COURT: I don't see what we accomplish by motions to strike. You can argue against the weight, you can cross examine, you could have asked questions on voir dire, you can rebut, but I think we are wasting time

with motions to strike. Can't we go ahead?

MR. CARRAD: Yes, your Honor.

Q Mr. Wasser, you -- I am going to pass this one by, your Honor.

THE COURT: All right.

Q Item 2 has also been excluded by the Court. I will pass that one by.

I will move along to Item 3.

Mr. Wasser, you stated earlier with respect to our discussion about Item 1-A, that you had made an adjustment to your figures there to eliminate the factor of purchases from the entities which were not Ford or Lincoln-Mercury dealers, isn't that so?

A Yes.

Q Have you made a similar adjustment to this item?

A Yes.

Q Where does that leave you?

A On the period from April 1963 through February, 1969, the revised figure would be 19,286.

Q That period has already been excluded as barred by the statute of limitations so let's go on to the next one --

MR. JAROSLAWICZ: Wait a minute. Statements

that counsel makes do not amount to questions. Since they are statement of either rulings or law that I might be called upon to contradict, I don't think they have any place.

THE COURT: What is your point, Mr. Carrad?

MR. CARRAD: Could I go on and get the second figure, your Honor?

THE COURT: Well, I don't know where we are. On Item 3, where are we now?

MR. CARRAD: Item 3, your Honor, is on the last page of Plaintiff's --

THE COURT: I am looking at it.

MR. CARRAD: On Wednesday, your Honor, the witness testified that we take out the period prior to the statute of limitation as the amount shown as a total would be reduced from $103,000 to approximately $83,000.

And there is further adjustment to be made, as you can see, there is an earlier figure of $24,268, for the first period. The witness has just reduced that to $19,286.

I'd like him to reduce the second figure, the $79,188 also to take into account purchases from sources other than Ford and Lincoln Mercury dealers, and that would be a further reduction to the $83,000 which is

after the statute of limitations. That is my point.

THE COURT: I thought that as a result of the recalculation we did on Wednesday, to take out periods and damage claims barred by the statute of limitations, we eliminated '65 entirely, '66 entirely, '67 entirely, '68 entirely, and we eliminated all of 1969 except the period from February 16, 1969 through September 30, 1969. And that meant that we reduced the 1969 figure from $345,112 to $207,000, right, Mr. Wasser?

THE WITNESS: Yes.

THE COURT: I think the record will show that anyway. What Mr. Wasser did was to take 2 percent of the $207,000 and the figure I have written down, and it would appear to be right, is $4,140.

THE WITNESS: Yes, your Honor.

MR. CARRAD: Yes, your Honor.

THE COURT: I don't know what it is -- are you trying to -- what correction in the $4,140 are you asking him about?

MR. CARRAD: Your Honor, the correction is this: That your figure of $207 and $4,140 included purchases from entities other than Ford and Lincoln Mercury dealers, and they are therefore too high. I believe there is a reduction of about 20 percent and that would apply to the later figure.

2b

THE COURT: Ask ni about it.

MR. CARRAD: I was trying to.

Q What is the figure?

A $18,286 for the period through February 1969.

Q That is $4,140.

What is the reduction on $4,140?

A From February 19, 1969 through September 20, 1974, the revised figure is $80,217 instead of the $79,188.

Q Will you tell me what the reduction of the $4,140?

A The $4,140 was the balance of the credits from February 1969 to September 20, 1969.

Q But by how much is that reduced by taking into account the fact that some of these purchases were not made from Ford or Lincoln Mercury dealers, that is all I want to know?

A Are you referring to the $4,140?

Q Yes, I am.

A You have a figure of $96,428 purchased of Ford parts which multiplied by 2 percent.

THE COURT: What are you doing? You are taking the $207,000 and taking some off?

THE WITNESS: Your Honor, under this question, this refers to Ford parts purchased.

THE COURT: What was the purchase of the Ford parts in the period 2-16-69 through 9-30-69? Do you know that?

THE WITNESS: Yes.

THE COURT: What is that figure?

THE WITNESS: Two figures. Just give me one moment, your Honor.

$2,739,294.

THE COURT: Just take a recess and present the revised figures. He is trying to calculate on the stand and we are really wasting time.

MR. CARRAD: Subject to taking his arithmetic, perhaps we can take that.

THE COURT: I think we are a little confused.

What other subjects do you want to cross examine?

MR. CARRAD: We are deferring Item 4 which is attorney's fees and that brings us to Item 5, Plaintiff's Exhibit 107 for identification.

THE COURT: Right.

Q Mr. Wasser, I am not sure I understand what you have done in this calculation. I would like to ask you some questions about it and I will do the best that I can.

What you seem to have done in the column headed calculations towards the bottom of the page, Item B, is to

take the annual mean increase of profit before officers accounts for three years and to average them, is that correct?

A Yes.

Q And those three years were fiscal 1970, '71 and '72?

A Yes.

Q And the percent of increase you have for 1970, that is the figure over in the last column is 39.7 over the preceding year?

A Yes.

Q Then it drops down to 15.8.

A Yes.

Q And comes back up a little bit to 20.1?

A Yes.

Q In earlier years I note there was a fluctuation in '68, the percentage of increase was 12.5 percent.

A In the year ended 9-30-68.

Q 12.5 percent.

A Yes.

Q Then it switched way up to 20.2 percent.

A Yes.

Q Is it your testimony it is meaningful in any way to take an average of figures which fluctuate this

widely and variably such an extraordinary amount from one year to the next?

A I have not used the extraordinary amounts in calculating the 29.2 percent, but prior to preparing this chart, I compared this with other businesses such as IBM, other clients, Genuine Parts, which is a wholesale distributor of auto parts and they all have fluctuations and in this type of calculation, the average is used .

Q It is used by you?

A It is used generally in financial analysis.

Q Do you have any references or authorities which would support that?

A In addition to my 34 years experience in the field, I brought the calculations, for example, in IBM from 1965 to 1972 the average annual mean increase of earnings per share, this is after taxes was 14.4 percent. Even before taxes which followed a normal pattern, it would still be approximately 14.2 percent compared with FLM's 37.7 percent.

In going to Genuine Parts Company, a wholesale distributor of non-crash parts, the average increase of earnings for the three years equivalent to FLM's 25.2 percent was 15.4 percent and in that period of time, Genuine Parts Company reached a price earnings ratio of 37.7 times

earnings based upon the three year record.

THE COURT: I don't see this is helpful. It seems to me that the question really is, what were the factors that led to the increases of profit shown by those years and could it be reasonably expected that if FLM had been able to continue business in this way, they would have had the same types of increases in the future ?

THE WITNESS: Yes.

THE COURT: That is what Ihave to figure out.

The 202.5 percent increase in profit shown for fiscal '69 over fiscal '68 was obviously due to the advent of the wholesale incentive allowance, right?

THE WITNESS: I believe that was the chief part of the increase.

THE COURT: Then the years you have taken, the fiscal '70, fiscal '71 and fiscal '72 for your average, were all years during which that wholesale incentive allowance was in effect?

THE WITNESS: Yes, your Honor.

THE COURT: What was the reason or what were the reasons according to your knowledge and analysis for these increases in profits during those years?

THE WITNESS: The efficient management of the company combined with the credits that were allowed

by Ford Motor Company.

THE COURT: Wasn't it simply that the overhead of FLM really didn't increase appreciably so they got -- they were able to take down increased gross profit on increased sales by and large to net; isn't that right?

THE WITNESS: Yes.

THE COURT: So, their net profit was increasing more or less in proportion to their increases of sales; isn't that right?

THE WITNESS: Yes.

THE COURT: Is more or less because obviously, in order to really find out whether the increased gross was being carried down to net, you would have to compare that and calculate it, but I would assume that that must have been the reason why you had these dramatic increases in percentage of net profits.

THE WITNESS: Yes, your Honor.

THE COURT: What was the basis for predicting that FLM would be able to continue or would have continued to increase its net profit by this average amount during the fiscal years you have discussed, fiscal '72, '73 and '74?

THE WITNESS: In addition to the statistical trends, FLM had an enviable reputation in the trade. They

had a well-stocked inventory, same day delivery service, efficient management, a good bookkeeping system, a good credit standing with the banks and on page 2, your Honor, I had calculated --

THE COURT: Were their sales increasing or is that part of the stipulation?

THE WITNESS: The sales increased from September 30, 1972 to September 30, 1973 as indicated in Defendants' Exhibit BF and in the stipulation submitted to the Court.

THE COURT: You had sales in '71, gross sales of 654,000. You had gross sales in fiscal '72 of 736,000. You had gross sales in '73 of 798,000.

What is the estimated gross sales for fiscal '74?

THE WITNESS: I estimated 695,020 and the reason for the drop --

THE COURT: What is the amount?

THE WITNESS: 694,020.

THE COURT: What is the reason for the drop?

THE WITNESS: The company has run into a problem of not having working capital because of the denial of the obsolescence credits chiefly.

THE COURT: Obsolescence credits?

THE WITNESS: I am sorry, your Honor. The wholesale incentive credits. We have had to borrow from the bank more frequently than we previously had to borrow. We have been beset with credit terms by the dealers, requests to pay in advance. The company has been unable to replace obsolete trucks because of lack of working capital. They have been unable to continue the expansion of employees that are needed for the increased sales. They have been unable to do so many things that are required and only with the proper cash in the bank, which is now down to $1200, could they continue to expand.

The net result of these problems is that they can't make the purchases that they wish to make to fulfill the orders that are required for expansion.

THE COURT: Let's just take fiscal '73.

You calculate on the basis of this average increase of profit that there would have been $39,000 more in profit in fiscal '73 had the wholesale incentive allowance been or had the conditions continued, right?

THE WITNESS: Yes.

THE COURT: Frankly, I don't find it terribly persuasive to use this average-growth-of-profit figure, and it seems to me if you are going to try to make a case for $39,500 lost increase in profits or lost profits, it seems to me that you would have to make an analysis of the sales versus the costs and to really try to demonstrate in some way what net profit could have been brought down with that sales volume and the overhead they had and if they had gotten the things you say they were denied.

THE WITNESS: YourHonor, for the year ending 9/30/73, due to the denial of these sundry credits, the largest part of which was the wholesale incentive credit, the hwolesale profit rate on sales dropped 19.2 per cent. Multiplied by the approximately $800,000 is $160,000 in that period of time that would have been part of the net profit.

Now, what I have done in my schedule is deduct -- is to show the projection on the continuation of the growth,and obviously with a $62,000 increase for 9/30/73.

THE COURT: In sales?

THE WITNESS: In sales. This met the

average of the prior two years from 9/30/71 to 9/30/72. It was a 12.6 per cent --

THE COURT: I am not following you because I don't have it in front of me.

I am just telling you that I think Mr. Carrad's point is that even for the last three years, or the three years -- let me start over.

If you take fiscal '70, '71 and '72, during which time the wholesale incentive discount was in effect, you have really widely fluctuating increases in profit from 15.8 per cent to 39.7 per cent, and in the middle you have 20.1 per cent.

What it would have been in fiscal '73, would it have been 40 per cent, would it have been 15 per cent, would it have been 20 per cent, would it have been some other per cent? I don't think you are solving that problem by just taking the average. I couldn't really give any weight to that at all. I will just tell you that right now.

THE WITNESS: Your Honor, during the recess, I have all the figures available, I can do that.

THE COURT: If Mr. Julien wants to try to put on some other proof of that, we can cross that bridge when we come to it. But I wouldn't give any

weight to the average figure.

MR. CARRAD: Your Honor, might I point out very briefly in connection with this, there is a projection for 1974, and what that does is to take off from the estimate of 1973 as a base, then apply the estimated increase, so it is an estimate times an estimate.

THE COURT: Yes. I see it.

MR. CARRAD: I would like to return to item 1E.

THE COURT: Yes.

Q Mr. Wasser, there was some discussion of item 1E before the court on Wednesday which I will not to duplicate but go on to other things.

When I took your deposition yesterday I asked you what source you had drawn the number 10 from down at the bottom line where you have 10 times $87,115, and you gave me --

MR. CARRAD: This is page 54.

Q -- you gave me, one of your sources was Internal Revenue Code regulation 20.2031-2F2.

THE COURT: What are we talking about now?

MR. CARRAD: The number 10 which is used to multiply the figure of $87,000 on the bottom line.

Q Mr. Wasser, I show you a copy of that regulation and I ask you to identify for me and the court where in that regulation you find the statement that some sort of a specimen of earnings should be multiplied by 10.

A This is not the book that I have referred to. It is the regulation I referred to, but I believe it would take the time of the court to locate the section.

Q I can give you the section you referred to.

A I know the section.

Q Would you show me where it states in there you should multiply some sort of estimate of earnings by 10 as you did in your calculations?

A The regulation does not say you are to multiply it by 10 but under Section 203-1, under the Internal Revenue Code and supporting regulations, under the New York tax law and other authorities, we use this as a formula. We do not use this for the factor. The factor is based upon other principles such as the earnings history, efficiency of management, and I believe in the Arnold Constable case, for example, a 10-year purchase was taken. I have the citation on that, if the court requires, and I have at least --

THE COURT: I am just not following you.

Your question simply was will he look at a part of the Internal Revenue Code or the regulations. Are you directing his attention to that?

MR. CARRAD: Yes.

THE COURT: What is your question and let's not just have him read or try to discuss it.

MR. CARRAD: The point is, he gave me that yesterday.

THE COURT: What is your question?

Q I want to know if that regulation or the section of the Code that you spoke of, which I have a copy of here, says in it anywhere --

THE COURT: Do you have the regulation?

MR. CARRAD: It's right there.

THE COURT: Then you know whether or not it's in there.

MR. CARRAD: I was trying to establish that from the witness.

THE COURT: Read it to me.

MR. CARRAD: The whole thing?

THE COURT: You don't have to have a witness read it.

In the first place, his deposition is not in evidence so there is nothing in the record right now

before me that even raises the issue about the authority of the Internal Revenue Code or regulations on the points, so I don't know what you are really starting off from.

MR. CARRAD: Your Honor, I was just trying to avoid asking Mr. Wasser the same question again and getting the answer from him. This is the authority he pointed to and I am trying to question him.

THE COURT: Not in any record before me. I wasn't at the deposition yesterday.

BY MR. CARRAD:

Q Mr. Wasser, are you familiar with a book by a gentleman named Alfred S. Dewing entitled "The Financial Policy of Corporations"?

A No, I am not.

Q You have never heard of Mr. Dewing?

A I have not read the book.

THE COURT: When was it published?

MR. CARRAD: I have here the fifth edition, which was published in 1953.

Q Did you say you are not familiar with the source but you have heard of Mr. Dewing? Did I understand your answer to say that?

A I would have to see the book. I don't re-

call his name.

Q I submit to you he is one of the leading authorities --

MR. JULIEN: I will object to this.

THE COURT: Sustained.

BY MR. CARRAD:

Q I show you this book --

THE COURT: We will take a short recess.

(Recess.)

MR. CARRAD: Your Honor, at this time I would like to offer into evidence Defendants' Exhibit CD for identification, which is the deposition of Mr. Wasser which I took yesterday, and to draw the court's attention to pages 52 through 55.

MR. JULIEN: I am going to object to offering it in its entirety.

THE COURT: I thought the arrangement we had on all depositions was that to the extent you have a right to offer a deposition you will nevertheless designate the portions in the usual bracketing which you are interested in submitting, and Mr. Julien, if he has any portions he is interested in using, he will designate with brackets.

Have you got it bracketed, what you are interested in? I would not consider anything unless you designate it.

MR. CARRAD: Your Honor, I will designate a portion. I would, however, like to offer the whole thing because it shows I was prevented yesterday from inquiring as to the basis of any of Mr. Wasser's calculations or from seeing any of his work papers that went into Plaintiff's Exhibit 106 ahd 107 and that is not reflected that the pages that I have designated for this

next specific item I was going to ask him. I believe that the whole thing should go in.

MR. JULIEN: That doesn't happen to be the fact, but even so it is not admissible for that purpose. That is not testimony.

MR. CARRAD: Whether or not that is the fact can be determined from the deposition. It is only 65 or 70 pages long.

MR. JULIEN: I have to object to it for that purpose, if your Honor please.

THE COURT: This is a discovery deposition, right? You have the witness on the stand. Really, it seems to me rather odd that you don't now decide on the basis of that deposition what to ask him, what you don't need to ask him, what you can agree to, et cetera. To introduce a 65-page deposition just to show you were deprived of some discovery doesn't seem to me to make any point. Why don't you ask him your questions right now.

MR. CARRAD: Yes, your Honor, and I hope you will forgive me if they go on longer than they should. That is the reason I was offering this.

THE COURT: If it is relevant, let it go on.

BY MR. CARRAD:

Q Mr. Wasser, before the recess I handed you a book by a gentleman named Dewing. Have you looked at that book during the recess?

A Briefly, yes.

Q It is your testimony, is it not, that you did not consult this volume in the course of preparing Plaintiff's Exhibits 106 and 107?

A Yes.

Q You did not.

Have you heard of three gentlemen named Graham, Dodd and Cottle, who are the authors of a book called "Securities Analysis"? The most recent edition is the fourth edition, and that is from 1962.

A May I see the book?

(Handed to witness.)

(Pause.)

A I am not familiar with this book.

Q And you therefore, I take it, did not consult it --

THE COURT: I would take the same vein, please.

Q Mr. Wasser, what authorities did you consult in preparing Plaintiff's Exhibits 106 and 107? And I

think you testified to your experience and your own personal views, so could we exclude that from your answer, please.

A No, I'd rather not exclude it.

THE COURT: Read the question and answer again, please.

(Record read.)

THE COURT: That is not a question. I wouldn't understand an answer to the question.

Q Mr. Wasser, what reference books or extrinsic sources outside your own personal knowledge did you consult in preparing Plaintiff's Exhibit 106 and 107?

A Outside of my own experience?

Q What books or authorities did you consult?

A Firstly, I am an authority.

Secondly, I consulted with 10 or 15 cases to refresh my memory. I consulted Homer Harris On Estates, which has reference to many of the accepted cases, and the factor of 10 or 15 is mentioned in that book. And the fact that the Internal Revenue Code, Section 2031(b), is to be taken just as a starting point. I feel that those were the bases of my preparation of 106.

Q Section 2031(b) of the Internal Revenue Code speaks of the valuation of unlisted stock and securities,

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and it states that in the case of stock and securities which are not by reason of their being listed on an exchange or publicly traded, the value thereof should be computed by taking into consideration to all other factors the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange. And you used that as the basis?

A No, I did not.

Q I thought you just told me that you consulted Section 2031(b)?

A Yes, but I did not use that part of the regulation as the authority for my formula. It is just part of the manner of calculating good will. And the code refers to unlisted stock,not evaluation of closed corporations. There is a difference. And we only use the Internal Revenue Code, and the Regulation 20.2031-2(F2), as the basis for the capitalization of earnings method, not for the factor to be used.

THE COURT: I don't know where we are. I thought you said you relied on a provision in the Internal Revenue Code or the regulations?

THE WITNESS: Only part of it, your Honor.

THE COURT: What in the Code or the regula-

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tions did you refer to? Give me the number.

THE WITNESS: The Regulation 20 --

THE COURT: Is it a regulation or is it part of the Code?

THE WITNESS: The Code --

THE COURT: What did you rely on?

THE WITNESS: I relied on both. The Code is 2031(b).

THE COURT: And then regulation what?

THE WITNESS: 20.2031-2(F2).

THE COURT: 2(F2)?

THE WITNESS: 2(Fs).

THE COURT: What did you rely on from Internal Revenue Code 2031(b)?

THE WITNESS: This explains the capitalizations of earnings method and the deductions of interest factors and the manner of using the formula they recommended for estates.

THE COURT: They try to save a little time. Do you have item E before you?

THE WITNESS: Yes, your Honor.

THE COURT: Is there any specific factor that you have calculated or used or considered in item 1E for which you find guidance in the Internal Revenue Code

or the regulation you have mentioned?

THE WITNESS: Part of the --

THE COURT: Do you find --

THE WITNESS: Partly.

THE COURT: Is there something that defines capital or tells you to take into consideration an interest factor of 8 per cent or tells you to include or exclude nonsupervisory salaries or to exclude or include officers' salaries or pensions or tells you the multiple of profits to use? Those are the specifications you used to get what you are getting in item 1E. Do you find any specific guidance in the Internal Revenue materials on any of those factors?

THE WITNESS: Yes, your Honor. On part of the factors.

THE COURT: Which factors?

THE WITNESS: The factor of excluding the interest on tangible assets or net worth.

THE COURT: Where is that in the Internal Revenue Code?

THE WITNESS: I think this is too abbreviated. I think if we refer to Harris on Estates --

THE COURT: Have you got the text of the Code provision before you? Just tell me, do you have

Internal Revenue Code 2031(b)?

THE WITNESS: Yes.

THE COURT: Do you have regulation 20.2031-2(F2)?

THE WITNESS: I can't find the regulation.

MR. CARRAD: It's in the other book.

(Pause.)

THE WITNESS: Yes.

THE COURT: What is there that gives you guidance in excluding interest on tangibles

THE WITNESS: (No response.)

THE COURT: Mr. Carrad, have you read the regulation and the Code section?

MR. CARRAD: Yes, your Honor.

THE COURT: Is there anything in either that talks about excluding interest on tangibles?

MR. CARRAD: Not in the regulations, your Honor.

THE COURT: Let's pass that.

Is there anything else you have laid out in your calculations, Mr. Wasser, for which you have gotten guidance in either the Code or the regulations?

THE WITNESS: Yes.

THE COURT: What?

THE WITNESS: There are Revenue rulings on cases --

THE COURT: No, I am asking you in the text of the regulation or in the Code provision is there anything that gives you guidance on any factors you have considered in item 1E?

A Yes, your Honor.

THE COURT: What?

THE WITNESS: Under Section 20.203-3 --

THAT COURT: That is anohter one. So you are referring now to another regulation.

THE WITNESS: Yes. I haven't had time to find the regulation that I had previously before.

THE COURT: 20.2033?

THE WITNESS: 20.2031-3.

THE COURT: What does that say?

THE WITNESS: The net value is determined on the basis of all relevant factors including, A, a fair appraisal as of the applicable valueation date of all the assets of the business, tangible and intangible, including good will.

B, the demonstrated earning capacity of the business, and C, the other factors set forth in Paragraphs F and H of regulation no.20.203-1 relating to the valuation of corporate stock to the extent applicable.

203.2, it's a long section, your Honor. Should I read it? All right, I will try to pick out the --

THE COURT: No, I'm really not interested in having sections of the regulations read to me out loud in court. But I'd like to know what it is in any of these materials that you relied on specifically for

specific items in this calculation.

THE WITNESS: May I explain further, your Honor?

THE COURT: No. If you can't answer my question, you can't answer my question.

THE WITNESS: Yes. In the application by the Treasury Department of Section 20.2031 the application by the Treasury Department has been in a certan manner, and that manner has been to exclude the interest on taxables of a rate of 6 to 8 percent, having excluded that from the earnings generally an average, but not necessarily so, but generally an average, and with salary adjustments, they then arrived at a figure, as I have done.

Then they generally take a factor of 6-2/3 percent, which is the same as guiding it by 15 percent.

Now, this is --

THE COURT: I am not with you.

THE WITNESS: I have used 10. They generally use 6-2/3.

THE COURT: You used 10 for what?

THE WITNESS: For the earnings subject to good will.

THE COURT: For the multiple?

THE WITNESS: The multiple.

THE COURT: What you are really saing is, you have read various materials about the interpretation and application of the code and regulation about valuing unlicensed stock, right?

THE WITNESS: Right.

THE COURT: And you believe that the calculation you have -- that the method of calculation follows those interpretations, right?

THE WITNESS: Yes, your Honor.

THE COURT: But it isn't specifically laid out in the language of the code or the regulation.

THE WITNESS: Well, there are revenue rulings that follow up the regulations.

THE COURT: Okay, but I'm just trying to get it straight. If we sat down right here and now and read through the language of Code 2031-B and Regulation 20.2031-2, or -3, we wouldn't find specific guidelines for the specific calculation you undertook, right?

THE WITNESS: No.

THE COURT: Okay. Then let's not waste time with those, struggling with the language. You are relying on various rulings or cases or interpretations.

THE WITNESS: Experience, yes, your Honor.

BY MR. CARRAD:

Q Mr. Wasser, I am going to have to ask you what those interpretations and cases are.

A Well, I have -- do you wish to have me read it into the record or do you want me to submit it?

Q I need to get it for the purpose of questioning you.

A I believe a very good dissertation is in Homer Harris on estates, but it's current and he refers to both the Treasury method of establishing good will for estates; he also refers to the New York State method.

Q This is Homer Harris on Estates?

A Yes. He has two sections on good will; one at page 492, 488, he refers to revenue rulings and some cases.

THE COURT: What's the first page reference?

THE WITNESS: Page 488.

THE COURT: What's the second page reference?

THE WITNESS: 383. In this text, aside from the cases listed and the Federal Law Annotated, he states net profits for a representative number of years are averaged and the result is multiplied by 10 or 15, depending on the business. The product is the value of the business including good will.

The alternate method is the method that I generally

follow and have followed in my Exhibit 106. You deduct from the average net profits a percentage of the net tangibles and capitalization, the result by multiplying a fixed number, adding the product to the net tangiblees furnishes the total value.

The second method is a method that I have used. The first method is a method that we use in big listed securities, for example, in valuing IBM at 37 times earnings.

Q Mr. Wasser, did you testify you used the second method in your calculation here?

A Yes.

Q I have the sentence as to deduct from the average net profits, and as I read your Item 1-E, first of all, you have a net profit before taxes, rather than after taxes, and second of all, that is as I understand it, just for one year, 1972; it is not an average for a representative number of years.

A It's the average, the restated net profit after taxes applied to the formula previously submitted to the Court arrives, we arrive at a figure of -- higher than the proposed assessment previously submitted.

MR. JAROSLAWICZ: That is 106, your Honor.

A Because the actual net profit restated,

according to SEC and other rules, came a net profit of $42,988 after taxes, whereas the net profit before taxes previously submitted from the company's records was $30,491.

Q Mr. Wasser, this figure you have for net profit before taxes in Item 1-E, $30,491, is that from the restated financials --

A That is prior to --

Q Is it from the restated financial statements or the financial statements prior to restatement?

A Prior to the restatement.

Q That is the one you elected to use here. On the financial statement --

MR. JULIEN: Excuse me. Is that a question? I don't understand whether that is a question or not. If it is, we haven't had a response to it. Are you asking: "Is that one you elected to use?"

MR. CARRAO: Yes.

A I am not electing to use that at this time.

THE COURT: The $30,491, is it or is it not the restated?

THE WITNESS: No, it is not, your Honor.

THE COURT: Not the restated.

THE WITNESS: I have taken that from the company's records and in the course of the short time that I had,

I rechecked all the figures and I find that on the re-stated figures the net profit before taxes is $52,388 and after taxes is $42,988.

THE COURT: So the restated figure is greater, right?

THE WITNESS: Yes, your Honor. And the interest factor would go up about $1,000, on the first line.

Q Mr. Wasser, you did elect to use $30,491 in this Item 1-E, did you not?

THE COURT: Yes, it's here. Let's go on. What's your question?

Q If that represents the net profit before taxes, in one of your financial statements, in that same financial statement, will you please tell me what was the net profit after taxes?

A I believe that was $9400 less, but --

Q I believe you told me yesterday --

THE COURT: Is that in evidence?

THE WITNESS: Yes, your Honor.

THE COURT: What does it say?

MR. CARRAD: It says $21,091.

THE COURT: All right, it says it. You don't have to ask the witness.

What's the next question?

Q My next question, Mr. Wasser, is this:

You testified that you regarded Homer Harris on New York Estates Practice Guide as an authority in this field and that you consulted this authority in the course of preparing Plaintiffs' Exhibit 106. And I pointed out to you a few minutes ago that the second method, and that is language from Page 333 which you referred, is to deduct from the average net profits.

A Yes, that's correct. It's Page 333.

Q And you elected to take the net profits before taxes just for one year rather than the average net profits for Item 1-E, did you not?

A That is not correct.

Q Is this an average?

A Yes, it is.

Q Of what?

A There are three types of average which only a sophistocated investigator would be familiar with the mean, the mode and the median. I used the median. The median in this case being the middle year, the fiscal year ending 9-30-72. The middle year as of this date, as of today.

Q As I understood this calculation, there was going to represent the good will that FLM had built up to by September 30, 1972 and you claim it has gone down to zero since then.

Can you explain to me why later years are pertinent?

A From a time factor, that is the median in this time factor. The mean very often is not correct, or using prior years. That is the median of the last five years. In my opinion, it is a correct approach.

Q What does Mr. Harris in his treatise represent?

MR. JULIEN: Objection.

THE COURT: Sustained.

Q Did you make the calculation as to what the average profits of FLM would be? Did you average all those figures as Mr. Harris recommends then decide not to use them or did you not use that calculation at all?

A I felt it wasn't pertinent since I had chosen the median approach.

Q So you did not do those calculations?

A No.

Q In the interest of the economy of time, would you be willing to support subject to your checking my arithmetic, if you use average and all the factors that go into this are reflected in the financial statements which you prepared which were introduced in evidence; that if you use a seven year average starting with 1966, the first full year of FLM's operation and going through your affidavit you have chosen, September 30, 1972, if you use it after tax earnings, the earnings for good will calculation and come to $51,000 and times 10 is $510,000 and if you used present tax earnings, the earnings for good will calculation come to $60,800 and multiplying that by 10 as you did, the good will comes to

$508,000, both of which are substantially below the $871,000?

MR. JULIEN: If your Honor please --

THE COURT: Sustained.

If you want a witness to come on the stand and testify to calculations which you believe are more valid than the calculations Mr. Wasser has made, then do it that way, but to have a long question about asking him to accept a lot of calculations which you have done, it's completely inappropriate.

Mr. Wasser, you are supposed to take pre-tax or after tax as the starting point for calculating this good will figure?

THE WITNESS: Your Honor, I hope I can simplify the answer to save the Court's time, but the after tax figure is used in the state valuation, but when you are dealing with a small closed corporation, we generally make a calculation reversing all the salaries and I come up amazingly to the same figure --

THE COURT: Are you supposed to take --

First of all, you are trying to get at this thing called good will.

THE WITNESS: Yes.

THE COURT: That is not the total value of the

company?

THE WITNESS: Not in this method.

THE COURT: It's the value of the company except for the tangibles?

THE WITNESS: Yes, your Honor.

THE COURT: In order to get the value of the company except for the tangibles, you start with some kind of a profit figure and you make adjustments, right?

THE WITNESS: Yes.

THE COURT: Does Homer Harris tell you whether to use pre-tax or after tax profits as your starting point?

THE WITNESS: Homer Harris does refer to the fact that adjustments have to be made.

THE COURT: Does he say you are to start with pre-tax or after tax profits?

THE WITNESS: I believe that the reference is to after taxes. I don't know if there is a specific reference.

THE COURT: Have you read it?

MR. CARRAD: I haven't been able to find that point but it speaks of net earnings. I have not been able to find that exactly defined in this Homer Haris volume on decedents state practice, but my understanding

of the term net earnings, and I think the commonly accepted one --

THE COURT: I am just trying to figure out while cross examining this witness, if you want your own theory presented, you should put on your own witness.

Am I correct, Mr. Wasser, you can't point to any authority in the Harris book which tells you to use pre-tax or after tax profits as your starting point; is that right?

THE WITNESS: That is right.

THE COURT: Do you have any authority at all you can point to that tells you to use pre-tax or after tax profits?

THE WITNESS: Yes.

THE COURT: What is that?

THE WITNESS: There was an early Treasury ruling in 1923 which said that the value, the net profit was to be reduced by income taxes. This was superseded by Revenue ruling in 1970, P 70-293. Cumulative Bulletin 1970, Point 1, Page 282, which declared the original ruling obsolete.. As a result of that revenue ruling, upon federal audits, we have a very wide latitude in deciding, for example, in a closed corporation of this type where you have 158,000 available to stockholder investments --

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THE COURT: What is the 158,000?

THE WITNESS: That was the availability -- in the year before the -- this is what was available to the two investors for division. 157,000.

Now, so much of that is not subject to income tax or can be drawn out --

THE COURT: Please. Are you telling me that under the revenue rulings which deal with this subject, you interpret them as saying that you can choose either before tax profits or after tax profits as a starting point in calculating good will or value of the business?

THE WITNESS: In a small closed corporation.

THE COURT: You can do either one?

THE WITNESS: In a small closed corporation.

THE COURT: Why did you decide to use the pre-tax profit as your starting point?

THE WITNESS: Because so much of the tax is subject to control. For example, pension funds are not taxable under Section 401. The salaries are not taxable. The factor of 10 would rise if we used an after tax factor, it's true, but it would not be a true picture and it's not the custom and practice in this size company.

THE COURT: What is it that establishes the custom and practice?

THE WITNESS: The custom and practice is based upon the expected return of an investor over a period of years.

For example, I have calculated that if we reverse all the salaries and presented this as an individual partnership, for example, to an investor, after taxes, does it that way, we would find that in eight years time, or a rate of 12.5 percent, the investor would have his money back. That is not even with the growth.

THE COURT: You are losing me a little bit again.

We have the financial statement which shows it after tax. What is the profit after tax?

MR. CARRAD: For 1972? $21,901.

MR. JULIEN: Page 5?

THE WITNESS: Item 5 of the plaintiffs' proposed assessment of damages shows the figure in column 1 of each year. That is before taxes.

THE COURT: So it's 20,091?

MR. CARRAD: Yes.

THE WITNESS: That is an unrestated figure. It's 40,000-some-odd for purpose of sale.

THE COURT: The figure you have in Item 1-E is the net profit before taxes and before restatement.

THE WITNESS: Yes, your Honor.

THE COURT: I am asking what is the net profit after taxes before the restatement?

THE WITNESS: The tax was $9400.

THE COURT: 20,091.

Do you have any other questions, Mr. Carrad?

MR. CARRAD: Yes, I do.

Q Mr. Wasser, you stated a few minutes ago it is possible in calculations of this sort to use either pre-tax or after tax earnings figures as a basis, is that correct?

A That is correct.

Q Isn't it true if you use the pre-tax figure, the multiplier should be lower?

A Lower than what?

Q Lower than the multiplier you used for the after tax figure?

A Yes.

Q You referred earlier to Internal Revenue Code Section 2031(b) and in that section of the Internal Revenue Code, it speaks of comparing a company whose stock is not listed or publicly traded or for which there is no market with similar companies which are publicly held companies and for which shares there is a market.

A The section refers to unlisted securities which is a little bit different.

Q Are FLM securities listed on any exchange?

MR. JULIEN: I will concede they are not.

Q Then FLM securities are unlisted?

THE COURT: Of course they are.

A But we are not talking about the sale of the securities.

Q Mr. Wasser, in the case of a company whose shares are listed, it's possible, is it not, to determine the earnings of that company from matters of public record?

A Yes.

Q Is it also possible, is it not, to determine the price at which the shares of that company are sold?

A Yes.

Q If you were to take the price at which a particular company's shares were sold and divide that by the earnings, you come up with a ratio, would you not?

A Yes.

MR. JULIEN: Isn't that perfectly evident?

THE COURT: Yes.

What are you getting at?

MR. CARRAD: I am getting to the point where I was stopped in my deposition yesterday with Mr. Wasser,

your Honor.

Q Mr. Wasser, do you know the name of that ratio?

A The price earnings ratio.

Q In your calculation hearing of Item 1-E, you have listed a good will value of FLM at $871,000 and you have listed your earnings for good will calculation at $87,000. So the ratio between the good will value and the earnings is a ratio of 10, is it not?

THE COURT: Of course it is, I can read. What is your question.

Q Mr. Wasser, are you aware of the fact on the date you selected for the valuation of FLM's good will, that the 30 stocks of the companies which compose the Dow Jones Industrial Average was selling at a price earnings ratio of 7.5 times their pre-tax earnings?

MR. JULIEN: I object to it. Irrelevant.

MR. CARRAD: It's a public record. I think the Court can take judicial notice.

THE COURT: Then why ask the witness?

MR. CARRAD: I asked if he was aware of it. It's his knowledge I am inquiring into.

THE COURT: Objection overruled.

Q Were you aware of that?

A I am aware --

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Q Please, may I have a yes or no answer.

Were you aware of that?

A That it was on a particular day, sir, I don't recall.

Q Are you aware of the fact that on September 30, 1972, the day you selected to calculate FLM's good will, that the stock of the Ford Motor Company was selling at 4 times its earnings?

A I am not aware of that, no.

Q Do you know which companies are included in the Dow Jones Industrial Average?

A Basically, yes.

THE COURT: Really, this is really terrible. I just can't permit the court to be used in this kind of stuff. If we are going to get into a comparison of the price-earnings ratio of FLI and Ford, this gets into an area of inquiry and an amount of analysis and comparison that just is completely out of hand.

MR. CARRAD: I have finished with my point.

THE COURT: Okay. Unless you come back and demonstrate, I can't use any of the figures you have given me. I can't say just because Ford had a price earnings ratio of four that that has anything at all to do with FLI's price-earnings ratio. Maybe FLI was doing a lot better than Ford, and just because the companies making up the Dow Jones average had a price earnings ratio of 7.5, what difference does it make to me without a lot of analysis?

Do you have any other questions of this witness?

MR. CARRAD: I would like to have on the record, your Honor, the other authorities, if any, that Mr. Wasser claims he consulted in preparing this exhibit.

MR. JULIEN: I think we have had all of that.

MR. CARRAD: Have we had all the authorities.

THE COURT: He listed Harris.

THE WITNESS: I have a number of others.

THE COURT: What others?

THE WITNESS: As I mentioned before, I have a list that I brought with me of 10 or 12 cases and memorandum. Should I submit it during the lunch hour?

THE COURT: He asked you what other authorities you rely on.

MR. CARRAD: I don't want to take the court's time. If Mr. Wasser has a memorandum, could we mark it and have it submitted as part of the record?

THE COURT: That would be fine.

MR. CARRAD: I ask it be marked as Defendants' Exhibit CE for identification and I offer it in evidence.

MR. JULIEN: May I see it first.

(Defendants' Exhibit CE was marked for identification.)

THE COURT: Any objection to CE?

MR. JULIEN: I haven't seen it before. May I look at it for a second?

THE COURT: Yes.

(Pause.)

MR. JULIEN: I do object. I think that notes made by this witness in the course of his study into this subject do not reach the level of evidence.

THE COURT: The objection is overruled.

(Defendants' Exhibit CE was received in evidence.)

Q Mr. Wasser, are you familiar with Revenue ruling 68-609?

THE WITNESS: May I have my papers back?

THE COURT: What is the date of the ruling?

MR. CARRAD: I don't have the exact date, your Honor, but it would ne in 1968. The other citation I have is 68-2 --

A I don't recall the Reveneu ruling number.

Q I have a copy of it here. I apologize for the poor quality of it. It is the only one I could find.

MR. JULIEN: What was the rest of it?

MR. CARRAD: Cumulative Bulletin 637.

Q Does that Revenue ruling describe the formula method for valuing the good will of an enterprise?

rka Wasser-cross

A This ruling --

Q It is an abstract.

A This ruling has been superseded by a later ruling, such as the one I had mentioned, Revenue ruling 7-293.

Q Does that specifically supersede 60-609?

A I don't know if it specifically supersedes it but it is on the valuation method, the formula method.

THE COURT: What is your ruling?

THE WITNESS: 70-293.

Q Mr. Wasser, in your item 1E you have used an interest factor of 8 per cent, is that correct?

A That is correct.

Q Do you find in the Revenue ruling 68-609, which I have handed you, a reference to an interest factor of 8 per cent?

A I find a reference to a percentage of 8 to 10 per cent may be used.

Q Associated with the 8 per cent interest factor is there a specific capitalization of earnings --

A 15 per cent, as I have previously mentioned. 6-2/3rds would be the multiple. Dividing by 15 per cent is the same as saying you multiply a figure by 6-2/3rds.

THE COURT: Dividing what?

THE WITNESS: Dividing the earnings by 15 per cent would give the same answer as multiplying the earnings by 6-2/3rds per cent.

THE COURT: There is something wrong in what you are saying.

You are dividing something by --

THE WITNESS: 15 per cent --

THE COURT: I am sorry.

Q It is the same as multiplying the earnings by 6-2/3rds?

A Yes.

Q Mr. Wasser, would you go back to item 1A.

You testified today that you calculated that the percentage you used to multiply here should be 19.6 instead of 16?

A That is correct.

Q And we went through a colloquy establishing that 19.6 was the equivalent of the statement that 80 per cent of FLH's purchases were of eligible parts at the 25 per cent rate on each eligible part?

A Based on a mathematical calculation.

Q Would it be correct to say that the corresponding numbers for your 16 per cent would be 64 per

cent?

A I don't follow you. I don't understand the question.

Q Your original estimate was that 16 per cent of FLM's cost of parts sold was ultimately reimbursed in some form or another by the dealers from whom you purchased parts?

A That is correct.

Q The wholesale incentive on each eligible part was 25 per cent?

A That is correct.

Q Isn't that the same thing as saying that 64 per cent of the parts that FLM purchased were eligible for the wholesale incentive at the 25 per cent rate?

MR. JULIEN: If your Honor pleases, I think that question overlooks something.

THE COURT: Let's see if he can answer it.

A I have to figure it out.

THE COURT: He will figure it out.

You don't have to take time right now.

Any other questions?

Q As to item 3, you testified earlier that you had revised your calculations on this item and you took down some numbers so as to adjust these to exclude purchases from sources other than Ford and Lincoln-Mercury dealers,

is that correct?

A That is correct.

Q And you have those calculations with you?

A Yes.

MR. CARRAD: I would like to mark them for identification and offer them in evidence.

THE COURT: These are the revised calculations to show the exclusion of parts purchased other than from Ford?

MR. CARRAD: Yes, sir.

THE WITNESS: This is the original.

MR. CARRAD: I offer it in evidence.

THE COURT: Let me see what we are getting. This would then replace 106 for identification, would it not?

MR. JULY: Only in part, your Honor.

MR. CARRAD: Is that a new exhibit?

MR. JULIEN: That is the one you just offered.

THE COURT: You offered a document called "Revision to Plaintiff's Proposed Assessment of Damages, September 29, 1974."

MR. CARRAD: Your Honor, I withdraw that offer. I asked Mr. Wasser for his work papers in which

he calculated the changes to item 3 on the exhibit which is presently before the court and that is not what he handed me.

May I have those work papers?

THE WITNESS: I would have to locate them.

THE COURT: Let's defer that. It will be marked Exhibit CF.

(Defendants' Exhibit CF was marked for identification.)

MR. CARRAD: That is all.

THE COURT: I don't think we need to recall him. All we have to do is have the revised figures for item 3 and that can go in by stipulation.

MR. CARRAD: These are the figures that counsel just offered.

MR. CARRAD: Your Honor, this appears to be a complete revision which in my haste I did not even take the opportunity to look at very closely and it is my fault, but we have never seen this and if there are new figures and methods and calculations in there, then we must have a chance to cross examine Mr. Wasser on them. If there is any material change, I haven't yet had a chance to see it and cross examine, and to offer this document at the conclusion of my cross examination of

their witness, who has testified to damages --

THE COURT: I don't know what we are going to have offered.

Do you have any redirect?

MR. JULIEN: Yes, I do.

THE COURT: Go ahead with your redirect.

MR. JULIEN: Would you mark this.

(Plaintiff's Exhibit 108 was marked for identification.)

REDIRECT EXAMINATION

BY MR. JULIEN:

Q Mr. Wasser, you have been questioned concerning revision of your figures with respect to one depending upon the actual purchases made of Ford crash parts and the allowance of wholesale incentive against that rather than against the total purchases made by Ford?

A Yes.

Q Is that revision reflected in 108 for identification?

MR. MAC CRATE: Before the witness answers, may I examine the document?

MR. JULIEN: Of course.

Q So that now the court has before it --

MR. MAC CRATE: Just a minute, please.

(Pause.)

MR. MAC CRATE: Your Honor, I object to any interrogation on this document at this time. It is an entirely new submission.

MR. JULIEN: Not so, your Honor.

MR. MAC CRATE: There is no possibility for defendants properly to prepare to examine with respect to the document.

THE COURT: Let me see it.

MR. JULIEN: This revision was made, your Honor, after a colloquy with counsel on Wednesday concerning which they have interrogated in a deposition before trial.

THE COURT: Item 1A is simply revised to reflect the figure that was brought out early this morning, the new figure for the alleged loss of incentive credits of 220,041. That is 1A.

1B is the same.

1C is the same. We are not admitting evidence on 1C.

What do we do with 1D? 1D is the same.

1E has some revision to the loss of good will, so that certainly is a problem. That is raised from 871 to a million -- 871,000 to 1.080 million. I guess that

is an increase of $200,000 or so.

Item 2 I don't see any change. Item 3 -- Mr. Wasser, look at item 3B. Item 3BI assume reflects -- and item 3C reflects deductions from the comparable figures in Exhibit 106 to take into account and exclude parts not purchased from Ford, is that right?

THE WITNESS: Yes, your Honor.

THE COURT: So these are the figures Mr. Carrad was seeking, items 3B and 3C in Exhibit 108 for identification.

What is item 3D?

THE WITNESS: Your Honor, 3D is in two categories, may be viewed in two categories. We have therefore shown it in two categories, but at the end of the total deducted one amount.

MR. MAC CRATE: Your Honor, with all due respect there is not even a copy for defense counsel to examine while this interrogation is going on.

THE COURT: Why don't you step up and look on. I don't think that is any problem.

THE WITNESS: Item 3D was originally the old 1D. It is still being shown as the increase of premium paid to dealers --

THE COURT: It's just a repetition of 1D.

THE WITNESS: Except that it is shown to show the entire 5 per cent of premiums, which is an amount paid because my client could not buy direct from Ford.

THE COURT: Item 4 is attorneys' fees. We are not considering that now.

Item 5 is exactly the same.

THE WITNESS: Yes, your Honor.

THE COURT: I don't see any problem with Exhibit 108. It has some corrections which we have been seeking, except that loss of good will is revised. Why have you revised the loss of good will? What's the reason for that?

THE WITNESS: Your Honor, I don't have a copy. It was taken away from the stand. Basically, I have revised the good will because there was $21,897

of the 1972 profit which was settled in the following year.

When I made the first calculation of good will I took this directly from the company's records. Under accounting principles when there is a settlement in the following year that pertains to the prior year -- in this case it was the incentive credits of July to September -- it does change the figure of profit --

THE COURT: You know, we have spent a good deal of time on that good will figure, and I really can't understand why you didn't have whatever figures you wanted to use in the first calculation. You had all the books and records and the financial statements.

THE WITNESS: Yes, your Honor. But this was the result of the defense counsel challenging the figures that I used in good will at the deposition yesterday. I then recalculated it last night. We typed it right --

THE COURT: What do you mean, "challenged"?

THE WITNESS: He questioned me as to whether I used the prestated or restated figures. This brought to my attention the fact that I used the prestated figures.

THE COURT: You knew about the reestimate

before you ever got to this trial, didn't you?

THE WITNESS: But I took it objectively.

MR. CARRAD: May I be heard, your Honor.

THE COURT: I am not going to receive evidence about a revised loss-of-good-will figure, and so that is that.

MR. JULIEN: I did not intend to offer, if your Honor please, that item as some indication that we were asking for the higher rather than the lower item at all. I was offering principally the figures which show the restatement in compliance with what counsel has been cross examining about, showing that in each instance we took a lesser figure in our original computation, and each figure which is changed as a result of some suggestion made by defendants' counsel results in a higher figure, which I am not presenting for the purpose of saying to the accept this as good will; I am standing by the good-will figure set in the first statement submitted to the court, 106 and 107. I stand by it.

I point out, however, that these items concerning which there has been examination both in a deposition and this morning would result in higher figures for the plaintiff rather than lesser figures.

MR. CARRAD: May I be heard for a moment

as to this document? I'd like to point out to the court that it is dated on the bottom, September 29, 1974. I would also like to point out that there is handwriting on here which appears to be that of Mr. Wasser. Were you using that document while I was cross examining you?

THE WITNESS: No, I prepared it last night.

MR. CARRAD: Did you have it in court that morning and did you write these numbers on it while I was cross examining you.

THE WITNESS: On page 1 you questioned me on the '64 --

MR. CARRAD: Did you write those numbers on there while I was cross examining you?

THE WITNESS: On page 1? I just put it down, 64 per cent. I am going to figure it out.

MR. CARRAD: Your Honor, I was not shown that document before beginning my cross examination, and I feel that if your Honor takes any notice of this at all, it was dated yesterday, Mr. Wasser had it on the stand, and we weren't shown it until I finished. I submit respectfully that if the court takes any note of it at all, then I have wasted two hours of everyone's time.

MR. JULIEN: On the contrary, if your Honor

please --

THE COURT: Oh, please. I don't know why it wasn't shown to you, but, look, over the lunch hour take 107 and 106 and revise them to make the changes that I am going to consider, the changes to 1A and the changes to 3A, and then I think we will introduce or have introduced into evidence 106 and 107.

Another change you better make in 106 and 107 is to bracket the items which I have ruled that I would not hear evidence on.

I think 108 has information in it which will be helpful in revising 106 and 107, but I think 108 would confuse the record to have it introduced into evidence independently, nobody has offered it, but I'm just anticipating it.

You take these three documents and try to work out revisions to 106 and 107, and then those documents I think will BE helpful to receive.

MR. JULIEN: Shall we physically make our changes on 106 and 107?

THE COURT: I think that would be a good idea. I have made some changes of my own, but you will have to make further changes. Is there any other redirect of this witness?

MR. JULIEN: Yes, I have some very few questions.

BY MR. JULIEN:

Q You have told us about your own experience. Did that experience include purchases and sales of businesses?

A Yes.

Q Would you tell us, please, I'm not quite sure I understand, why you employed the pretax figure rather than the posttax figure as one of the footings or bases for your assessment of the good will of this company? Why did you employ pretax?

A Well, there are a number of reasons. One reason is that you cannot compare a business of this size so closely controlled with the price-earnings ratio after taxes of a company such as Ford, where you are not only a minority stockholder, but you practically have no say in the management at all. There is a value in the management. There is a value in the disposition of the profits before salaries. As I previously pointed out, pensions are deductible, salaries are deductible -

Q I am not asking you to repeat anything you have said before. If this is new material, then you may say it.

A Yes. Because of the fact that it is so closely controlled, using an after-tax figure, even though the ratio would be higher, the fact it would be higher, it would confuse the purchase and sale of the business.

THE COURT: In other words, if you used an after-tax figure you couldn't crank back in this, like officers' salaries, which you think should be changed, back in?

THE WITNESS: Yes.

THE COURT: In order to find out the real profit of the two principals of this company.

THE WITNESS: Exactly.

THE COURT: And since there are really only two people, their salaries should go back in before you can calculate a profit figure?

THE WITNESS: Yes, sir.

THE COURT: And then you use a lower multiple to take into account that you have excluded taxes and you have included certain other things.

All right. I think I get it.

BY MR. JULIEN:

Q Is that lower multiple employed in such instances the multiple which you employed here?

A Yes.

MR. JULIEN: Thank you.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Are you ready to rest, Mr. Julien?

MR. JULIEN: I am offering in evidence, if your Honor please, those portions of the depositions of Mr. Morros Rowland taken on September 6, 1974 which has been marked and bracketed in red.

THE COURT: What's the exhibit? Let's get those marked for identification.

(Plaintiff's Exhibit 109 was marked for identification.)

MR. JULIEN: On 109 for identification I offer the bracketed portions in evidence. Our opponents were advised of the bracketed portions we were selecting.

MR. MAC CRATE: May I inquire, your Honor, yesterday we were provided a handwritten sheet indicating the portions of the depositions that were going to be offered.

Can you confirm, Mr. Julien, that what is bracketed is what is indicated on this handwritten sheet that I have marked CC for identification?

MR. JULIEN: Yes.

THE COURT: Any objection to those portions?

MR. MAC CRATE: Not, your Honor, if additional material from the deposition which I would like to tender is also marked.

THE COURT: Are you ready to offer that?

MR. MAC CRATE: I am indeed.

THE COURT: Have you marked that on the deposition?

MR. MAC CRATE: We have not had access to the copy, but we do have an itemized statement of what we would propose, which is by page and line.

MR. JULIEN: I haven't seen this, your Honor.

THE COURT: Then, Mr. Julien, why don't you --

MR. JULIEN: Check it out over the lunch.

THE COURT: -- check it out.

MR. JULIEN: Very well.

THE COURT: Then see if you can agree to what Mr. MacCrate offers. Then the second deposition?

(Plaintiff's Exhibit 110 was marked for identi-

fication.)

MR. JULIEN: That is of James R. Rose. That was taken September 6, 1974. Once again the same system was employed. So I offer the bracketed portions.

THE COURT: Okay. And Mr. MacCrate, you have a designation of what you want?

MR. MAC CRATE: I have, your Honor.

THE COURT: Over lunch why don't you just physically bracket it and Mr. Julien can consider your portions. I will reserve rulings until after lunch. Any other depositions?

MR. JULIEN: No, that is it with the depositions.

Now, if your Honor please, you may recall that when you received Exhibit AH, which was from the Ford book showing summary of incentives and allowances, at that time I called attention of counsel and the court that the preexistent sheet, that is, the sheet prior to the change of June 30, '71, had not been received in evidence. I am offering that sheet in evidence.

MR. MAC CRATE: Objection, your Honor.

THE COURT: Let me see AH, please.

MR. JULIEN: This is what the defendant

cla

offered.

(Pause.)

THE COURT: What about that?

MR. JULIEN: I want to offer the sheet which was either equivalent, which existed prior to that change --

THE COURT: Is that marked for identification?

MR. JULIEN: Yes, it is part of another exhibit. I will have it marked separately.

(Plaintiff's Exhibit 111 marked for identification.)

MR. JULIEN: With respect to this, your Honor, please ignore the pencil markings, which are my own.

THE COURT: That's all right. There is an objection to that. The objection is overruled.

MR. MAC CRATE: Your Honor, may I be heard? Without testimony that document cannot at this time, I submit, be marked in evidence. There is nothing that identifies that piece of paper as the statement of policy which existed prior to June 30, 1971.

THE COURT: You are simply saying that this is the comparable page in the price list that was in the price list before the revision of June 30, '71. Ford ought to know whether it is or it isn't.

MR. JULIEN: They gave it to us.

THE COURT: Was it in the price list?

MR. MAC CRATE: I don't believe so, your Honor. I believe that that was the markup and the proposal that was circulated internally in Ford in the course of the spring of 1971 --

THE COURT: If there isn't a stipulation that this was the price list, then I wouldn't receive it.

MR. JULIEN: These were the documents they handed us, if your Honor please. They gave us this document

as part of Exhibit 8 for identification, from whence came the other that your Honor has received.

MR. MAC CRATE: There may have been an error in assembling, but the document that is dated April 30, 1971 I believe related to an earlier circulation.

THE COURT: That can be checked out. What you want to introduce, on the subject of what it says, you want to introduce the page from the price list while the incentive was being allowed in the form it was before the change of policy, which is okay as long as it's the right list.

Mr. MacCrate, you will find that.

MR. MAC CRATE: We will undertake to find a copy.

THE COURT: All right. Anything else?

MR. JULIEN: Yes. Defendants' Exhibit A for identification, I offer into evidence as a plaintiff's exhibit. That is the franchise form of agreement.

THE COURT: Any objection?

MR. MAC CRATE: No objection, your Honor.

(Plaintiff's Exhibit 112 was received in evidence)

MR. JULIEN: That is the plaintiff's case, your Honor.

THE COURT: All right. Subject to those items which are open, the rulings on the depositions, and the checking out that page from the price list, you rest subject to those things.

MR. JULIEN: Yes, I do, sir.

MR. MAC CRATE: Your Honor, I'd like at this time to move to strike all hearsay evidence relating to conversations between Mr. McKee andMr. Pollack appearing in the transcript at Pages 168 to 169, and 175. I believe that these portions of the testimony should be stricken due to plaintiff's failure to introduce any independent evidence of alleged conspiracy or that the acts were performed in furtherance of the alleged conspiracy.

THE COURT: I don't have those volumes.

MR. MAC CRATE: It appears in the volume of testimony at Page 130.

THE COURT: You are moving to strike what specific part?

MR. MAC CRATE: The testimony as to conversations appearing at 168 and 169, and on 175.

THE COURT: I think the testimony was that at about that time Mr. McKee called for and attempted to place some orders, and he was denied the ability to place those orders. And I think in view of that testimony I

could not grant the motion to strike. I will deny the motions to strike.

MR. MAC CRATE: The testimony, your Honor, was that he tried to place orders under a particular code number.

THE COURT: Right. Motion denied.

MR. MAC CRATE: I would like at this time to move to dismiss the complaint for the failure to establish a prima facie case.

THE COURT: Motion denied.

MR. MAC CRATE: May I state for the record on what bases I make my motion, or I am prepared to file a motion to dismiss, your Honor.

THE COURT: You can certainly state your grounds.

MR. MAC CRATE: That the record establishes there is no evidence of any contract, combination or conspiracy in violation of Section 1 of the Sherman Act either between defendant Ford Motor Company or defendant Ford Marketing Corporation, or between defendant Ford Motor Company and/or Ford Marketing Corporation and any of their dealers.

Secondly, there is no evidence of any restriction in violation of Section 1 of the Sherman Act on the right of defendants' customers to resell defendants' products.